Supreme Court, U.S.
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No. 96-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

CAROLYN WEAVER,

Petitioner,

v.

UNITED STATES INFORMATION AGENCY, JOSEPH DUFFEY, DIRECTOR, USIA, THE VOICE OF AMERICA, RICHARD CARLSON, DIRECTOR, VOA, UNITED STATES DEPARTMENT OF STATE, WARREN CHRISTOPHER, SECRETARY OF STATE,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Federal regulations establishing a mandatory pre-publication review process, published as 3 FAM § 628, require that all covered public employees, regardless of rank, submit for review by their government employer, teaching, writing or speaking materials of "official concern", prepared in their unofficial capacity of private citizen, to the government prior to publishing the material. The regulation authorizes government officials to review the viewpoint expressed in the employee's proposed unofficial and private publication. The questions presented are:

1) Whether a mandatory prepublication review process, which authorizes the government to deny clearance for the publication of material, written by a public employee, on the basis of the content or the viewpoint expressed, violates the First Amendment.

2) Whether a mandatory preclearance review process which is not limited to insuring that classified material is protected, violates the First Amendment rights of public employees and the public.

3) Whether a mandatory preclearance review process which does not contain any procedural safeguards violates the First Amendment of federal employees and the public.

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In the Supreme Court of the United States
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No. 96-

CAROLYN WEAVER, Petitioner

v.

JOSEPH DUFFEY, USIA, DIRECTOR, ET AL.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT
PETITION FOR A WRIT OF CERTIORARI

Petitioner Carolyn Weaver respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit is reported at 87 F.3d 1429, and is reprinted in the appendix hereto, App., *infra,* 1a. The opinions filed on the denial of rehearing en banc and denial of reconsideration, App., *infra*, 66a-67a, are unreported. The memorandum and decision of the United States District Court for the District of Columbia has not been reported. It is reprinted in the appendix hereto, App., *infra*, 61a.

JURISDICTION

The judgment of the court of appeals was entered on July 9, 1996. The petition for rehearing and rehearing en banc was denied on October 31, 1996. This Court has jurisdiction to issue the writ under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

The First Amendment of the United States Constitution provides: "Congress shall make no law * * * abridging the freedom of speech, or the press * * *."

The relevant portions of the regulations at issue in this case, 3 Foreign Affairs Manual ("FAM") §628 state:

3 FAM 628.1 :

> The provisions of this section apply to all employees, including foreign nations, of State, AID, and USIA, in the United States and abroad, with respect to: a. Clearance of writings; and b. Clearance of engagements to speak, lecture, teach, or participate in conferences.
>
> * * *

3 FAM 628.2:

> a.. . . All speaking, writing and teaching materials which may reasonably be interpreted as relating to the current responsibilities, program or operations of any employee's agency or to current U.S. foreign policies, or which reasonably may be expected to affect the foreign relations of the United States are of official concern and shall be submitted, as provided in the

following pertinent sections, for clearance by the employee's agency, whether the employee is acting officially or privately.

b. No employee shall publish any material of official concern under paragraph a until it has been cleared. The purpose of this clearance requirement is to substitute the agency's institutional judgment for the employee's judgment when the question involved concerns either the release or accuracy of information concerning the employee's agency's responsibilities or what conclusions should be drawn form such information***

c. Clearance will not be granted until all classified material and all material of official concern under paragraph a which is inaccurate, inconsistent with current foreign policy, or can reasonably be expected to affect adversely U.S. foreign relations, has been deleted from the proposed speaking, writing or teaching material.

3 FAM 628.5-3:

All books, articles, and other manuscripts of official concern under section 628.2, prepared for publication by an employee in an unofficial capacity, shall be submitted for clearance in advance of publication in accordance with procedures in section 628.5-2. Authors will be notified of decisions with respect to clearance of manuscripts, and the manuscripts will be either returned or forwarded, upon written request, to publishers or agents designated by the author * * * the employee is responsible for having published with it a specific statement to the effect that the opinions and

> views expressed are the employee's own and not necessarily those of the employee's agency * * * * To avoid possible embarrassment, the employees should not make commitments to publishers until manuscripts have been approved.

3 FAM 628.5-2:

> * * *
>
> Preliminary clearances shall first be obtained from appropriate offices of the agency concerned with the subject matter. Subordinate personnel shall, after obtaining any necessary preliminary substantive clearances from appropriate offices of the agency concerned with the subject matter, submit such material for clearance to (1) the head of their overseas establishment, if serving abroad, or (2) their office director or official of comparable frank if in State or AID, or by the office or service heard if in USIA, if assigned in the United States, who may either disapprove the material or approve it and refer it for further review by the appropriate office named in section 628.3-1a.
>
> 3 FAM § 628.3-1a:
>
> The appropriate office in State, is the Bureau of Public Affairs; in AID, in Information Staff; and in USIA, the Office of Pubic Information

STATEMENT OF THE CASE

This case concerns the constitutionality of specific governmental regulations codified within 3 FAM § 628. These regulations apply to employees of the Department of State

(State), the United States Information Agency (USIA)[1/] and the Agency for International Development (AID) and require their employees to submit all teaching, writing and speaking materials of "official concern" to the executive for approval prior to their publication. 3 FAM § 628.2a-c.

As a threshold matter, the regulations apply to "all employees" of the designated agencies, regardless of position, job duties, access to classified information or official status. 3 FAM § 628.1. The regulations apply to speech (both written and oral) performed in a "private capacity." 3 FAM § 628.2a; 3 FAM § 628.5-3. Under the regulations, every employee is required to submit written materials of "official concern" to their employer prior to the publication of the material, even though those materials are prepared in their unofficial capacity as private citizens.. The failure to submit an article for such review, regardless of whether the actual content of the article in fact violates any standard of conduct, is an infraction of the rules and can lead to employee discipline, including discharge.

Matters of "official concern" cover a broad range of topics, ranging from "current U.S. foreign policies" to any current matter within the "responsibilities," "programs" or "operations" of an employee's agency. 3 FAM § 628.2a. Thus, a published complaint "blowing the whistle" on misuse of government funds within an employee's agency, a letter to a local newspaper editor related in any manner to U.S. foreign policy or a university class lecture related to current foreign policies, would all be deemed as matters of "official concern" and would be subject to the prior review requirements.

[1/] The Voice of America (VOA)is a component of the USIA.

The scope of the government's prepublication clearance review is not limited to insuring that classified material is not released. Indeed, the prior review focuses specifically on the content and viewpoint of the speaker or writer in order to insure that the proposed speech is not "inaccurate" and is not "inconsistent with current foreign policy." 3 FAM § 628.2c. Moreover, the regulations grant the executive authority to "substitute the agency's institutional judgment for the employee's judgment" on employee off-duty speech. 3 FAM § 628.2b. "[C]learance" to publish the material "will not be granted" until "all material of official concern" which is deemed by the executive to be "inaccurate" and "inconsistent with current U.S. foreign policy" or which "can reasonably be expected to affect adversely U.S. foreign relations" is "deleted from the proposed speaking, writing or teaching material." 3 FAM § 628.2c.

There are no guidelines, time limits or procedural safeguards which temper the discretion of agency censorship. The regulations merely set forth the persons to whom the proposed speech must be submitted. Under these regulations, an employee who, in an "unofficial capacity" prepares an "unofficial" publication on a matter of official concern must first obtain a "preliminary clearance" from the "appropriate offices of the agency concerned with the subject matter." 3 FAM §§ 628.5-3 and 628.5-2. After obtaining the preliminary clearance the employee must submit the material to their own office director. 3 FAM § 628.5-2. The office director may "either disapprove the material or approve it." 3 FAM § 628.5-2. If the office director approves the material, it is then referred to the responsible public affairs office for final "acceptance." 3 FAM §§ 628.5-2 and 628.3-1a.

Finally, employees are advised not to make any "commitments to publishers until" one's "manuscript has been

approved" by the agency. The regulations contain this warning in order to help employees "avoid possible embarrassment" with publishers. 3 FAM § 628.5-3.

Thus, under the regulations, a parking garage attendant, with no access to classified information, could be terminated from his position merely for writing a letter to the editor about NAFTA without first submitting the letter to an official censor and otherwise complying with the requirements set forth in 3 FAM § 628, and complying with the censor's opinion regarding what facts in the letter are "accurate." Worse, the censor could request that the parking garage attendant change the viewpoint contained in the letter.

Petitioner Carolyn Weaver is employed by VOA to work part-time as a writer and editor in a non-supervisory and non-policy making capacity. Her job does not require the use of classified or confidential government material and she has never encountered any at VOA.[2/] However, if Ms. Weaver were given access to classified information (which is not expected or anticipated), she has contractually agreed not to disclose such information.[3/] In performing her part-time duties

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[2/] Although Ms. Weaver has never had any access to classified information, upon part-time employment with VOA she obtained a "non-critical confidential" security clearance. "Non-critical confidential" status means that a background investigation determined that Ms. Weaver is cleared to see non-critical classified information should such a need arise. It does not imply that she worked with or has had access to such classified information.

[3/] On October 22, 1984, Ms. Weaver signed a "Classified Information Nondisclosure Agreement" (SF 189) and consented to the review procedures contained therein. The constitutionality of the SF 189 nondisclosure agreement is not challenged in this case. See, *Snepp v. United*

(continued...)

at the VOA, Ms. Weaver relies upon the same "resources and rules which are used" by other "news organizations." In fact, as a matter of federal law the VOA is required to adhere to the "same basic journalistic principles, methods, values, and standards as other news organizations."

At the time she was hired as a part-time employee, VOA knew that Ms. Weaver was a freelance journalist and that she published articles outside of the agency. In 1988 Ms. Weaver chose to write an article for the Columbia Journalism Review (CJR) which related directly to activities of her employer, the VOA. The article was prepared on Ms. Weaver's own time and at her own expense. The contents of this article fit within the 3 FAM § 628 definition of "official concern." Consequently, Ms. Weaver was required to submit the article to her management and to a government censor prior to its submission to CJR for publication. 3 FAM § 628.2. Ms. Weaver declined to submit the article for pre-publication review by the agency. On June 30, 1988, Ms. Weaver challenged the constitutionality of 3 FAM § 628 in U.S. District Court for the District of Columbia. She filed an amended complaint on February 26, 1989 alleging, *inter alia*, that the preclearance scheme constituted an unconstitutional prior restraint upon her and other similarly situated employees. The district court had jurisdiction over her claims pursuant to 28 U.S.C. §§ 1331 and 1346. Although her amended complaint contained multiple counts, Ms. Weaver only requests that this Court review the dismissal of Count I of her complaint. Count I, which sought injunctive and declaratory relief, "was a general First Amendment challenge to the prepublication scheme." App., *infra*, 3a.

(...continued)
States, 444 U.S. 507 (1980).

On November 18, 1994, the district court dismissed Ms. Weaver's complaint and denied her application for injunctive relief. App., *infra*, 61a-65a. On December 16, 1994, Ms. Weaver filed a timely appeal of the district court's judgment to the U.S. Court of Appeals for the District of Columbia Circuit. The Court of Appeals had jurisdiction over this case pursuant to 28 U.S.C. § 1291 and Rule 4 of the Federal Rules of Appellate Procedure.

On July 9, 1996, a divided court of appeals panel affirmed. App., *infra*, 1a-60a. The panel majority held that the 3 FAM § 628 regulations did not violate the First Amendment. The majority reasoned that "prior restraints" on speech were "simply among the factors to be considered" when applying the traditional *Pickering* balancing test. *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968), App., *infra*, 22a. The majority held that the requirement to submit the publication to a management reviewer and obtain a clearance for publication was permissible, reasoning that the clearance process merely gave employees an insurance policy that they could not be punished for publishing their speech. If approved by the censor, the material was "welcomed" into a "safe harbor." App., *infra*, 24a. The majority found that the informal "pressure," the "discouragement effects" and the potential for the "delay" in publication were "milder" deterrents on speech than the honoraria ban found unconstitutional by the Court under *United States v. Nat'l Treasury Employees Union,* 115 S. Ct. 1003, 130 L.Ed. 964 (1995) ("NTEU"). App., *infra*, 24a.

Although the regulation, on its face, prohibits an employee from publishing speech which was not cleared by a censor (see, e.g., 3 FAM § 628.b, "No employee shall publish any material of official concern . . . until it has been cleared."), the majority interpreted the regulation merely to mandate that employees submit to the "clearance process." App., *infra*, 11a.

They found that even if clearance was denied, the employee could, at his or her own risk, publish the article. App., *infra*, 11a-19a. Furthermore, the majority concluded that a denial of clearance was not equivalent to denial of the right to publish . In this regard, an employee would still publish an article, even if his or her employer determined that the article would not be approved for publication, because if the article did not violate *Pickering* "the employee" would have "nothing to fear by going ahead." App., *infra*, 24a. In this vein, the employee whose writing was not cleared "is not made worse off by having advance notice of the government's view."*Id.*

Judge Wald filed a lengthy dissent. App., *infra*, 29a-60a. She found that the prepublication clearance procedure at issue in this case "goes far beyond any employee restriction previously upheld by this court or the Supreme Court." App., *infra*, 50a. Judge Wald found that the majority's interpretation of the regulation "breathtakingly" departed "from the text of the regulation" and that "no canon" of statutory construction could "justify" the majority's holding that the regulation did not directly prohibit the publication of non-cleared speech. Judge Wald found the majority's holding was "directly contrary" to the rule of law set forth in *Keyishian v. Board of Regents*, 385 U.S. 589 (1967). Judge Wald also found that the regulation was unconstitutional under a *Pickering/NTEU* analysis:

> "This sweeping prepublication review based on the manuscript's content (and the author's viewpoint and 'conclusions') goes far beyond review for classified information, and is not justified by anything in *Snepp* or any other case. U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968). App., *infra*, 49a-50a.

Ms. Weaver sought rehearing, and suggested rehearing en banc. App., *infra*, 66a-67a. The court of appeals denied the

petition for rehearing, and over three dissents rejected the suggestion for rehearing en banc. *id.*

REASONS FOR GRANTING THE PETITION

I.

The decision of the court of appeals raises an important and unresolved question on the constitutionality of viewpoint-based restrictions on speech in government employment.

The 3 FAM § 628 regulation constitutes a classic example of viewpoint-based discrimination. Outside the context of government employment, the restriction would unquestionably be unconstitutional. Compare *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968) with *R.A.V. v. City of St. Paul, Minnesota*, 505 U.S.377, 383-88 (1992). *Also see Simon & Schuster v. Members of the New York State Crime Board*, 502 U.S. 105, 116 (1991); *Turner Broadcasting Sys., Inc. v. FCC*, ___ U.S. ___, ___, 114 S.Ct. 2445, 2458, 129 L.Ed. 497, ___ (1994).

However, in the context of government employment, the constitutionality of content and viewpoint-based restrictions or prior restraints on a broad category of expression by a massive number of potential speakers has not been specifically addressed. *U.S. v. NTEU*, __ U.S. __, __, 115 S.Ct. 1003, 1013, 1014, 130 L.Ed. 964, ___ (1995). Because content and viewpoint-based restrictions raise the "specter of Government control over the marketplace of ideas," determining the legality of such restrictions is a crucial issue which needs to be resolved. *U.S. v. NTEU*, __ U.S. __, __, 115 S.Ct. 1003, 130 L.Ed. 964 (1995)(J. Rehnquist dissenting).

Although this Court has not directly addressed the issue of content and viewpoint-based preclearance review requirements in the context of protecting government employee, any such restriction strongly conflicts with the principle of prior rulings of this Court. See, e.g., App., *infra*, 39a at n.6.

The issue of whether viewpoint and content-based restrictions or disincentives of government employee speech are consistent with the First Amendment raises an important and undecided question of constitutional law and merits this Court's attention.

II.

The decision of the court of appeals directly conflicts with this Court's decisions regarding disincentives on speech.

It is well settled by this Court that a disincentive on speech, which does not actually prohibit speech, can impose significant burdens on expressive activity. *United States v. Nat'l Treasury Employees Union,* 115 S. Ct. 1003, 1014, 130 L.Ed. 964, ___ (1995). Accord, *Simon & Schuster v. New York Crime Victims Board*, 502 U.S. 105, 115-16 (1991). It is likewise well settled by this Court that requiring an author to submit speech prior to publication for some form of preclearance review imposes a significant burden on speech. See, e.g., *Pittsburgh Press Co. v. Pittsburgh Com'n on Human Rel.*, 413 U.S.376, 390 (1973)("The special vice of a prior restraint is that communication will be suppressed, either directly or by inducing excessive caution in the speaker, before an adequate determination that it is unprotected by the First Amendment").

The majority decision of the court of appeals panel in this case directly conflicts with *NTEU* and *Pittsburgh Press*. The lower court majority benevolently viewed the prior review requirements of 3 FAM § 628. They found that the prior review process created a "safe harbor" for speech. App., *infra*, 24a. However, the concept of a government censor reviewing the content of and viewpoint expressed in speech prior to its publication, and determining which opinions and views fall into a "safe harbor" and which opinions and views may subject the speaker to adverse action, is completely repugnant to the First Amendment.

As set forth in *Pittsburgh Press* and Judge Wald's dissent, App., *infra*, 54a-60a, a prior restraint on speech can induce "excessive caution in the speaker." For this reason, even without an overt prohibition on speech, prior review schemes have been consistently subjected to the strictest constitutional scrutiny. *Lamont v. Postmaster General*, 381 U.S. 301, 309 (1965)(J. Brennan concurring)("inhibition as well as prohibition against the exercise of precious First Amendment rights is a power denied to government"); *Bantam Books v. Sullivan*, 372 U.S. 58, 63 (1963)("informal censorship may sufficiently inhibit the circulation of publications to warrant injunctive relief").[4/]

[4/] Significantly, Judge Cote in the U.S. District Court for the Southern District of New York cited to Judge Wald's dissent in this case when he found a New York City prior review requirement unconstitutional. *Harman v. New York City*, 12 IER 481, 491 (S.D.N.Y. 1996). In his decision, issued on November 26, 1996, Judge Cote cited to three danagers posed by prepublication review schemes: (1) the risk of "self-censorship"; (2) such mechanisms make it "more likely that an employee will be subject to sanctions after speaking" if the speech was previously disapproved; and (3) the scheme will result in "content and viewpoint censorship." All three of these dangers are present in this case. .

Far from offering a speaker a "safe harbor" for speech, prior reviews are inherently suspect and subject to greater constitutional scrutiny than regulations involving subsequent punishment for expression. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975)("a free society prefers to punish the few who abuse rights of speech *after* they break the law than throttle them and all others beforehand"); The "safe harbor" concept adopted by the majority of the court of appeals panel which decided this case conflicts with the decisions of this Court regarding the harmful nature of the informal pressure implicit in prior review schemes.

Dissenting viewpoints are necessarily suppressed by a regulation that purposefully "substitutes the agency's institutional judgment" over the "employee's judgment" about the accuracy of certain facts and/or the conclusions that should be drawn from the expression. In order to obtain the required "clearance" for submitted publications, an employee must be willing to delete and change information deemed "inaccurate" or "inconsistent" with government policy.[5/]

Requiring authors to submit their writings to their employing agency's management, prior to publication, is inherently coercive. The individuals responsible for the prior review control the career and livelihood of the submitting-public employee. The opinions and wishes of that agency, presented prior to publication, unquestionably would result in changing the content and slant of the author. The regulation constitutes a full-scale government intrusion on the marketplace of ideas.

[5/] Ms. Weaver recognized the invidiousness of the regulation, understanding that viewpoint based discrimination destroys the essence of creativity. The regulation makes the government the unsolicited editor and co-author of expressions submitted for review.

III.

The decision of the court of appeals creates a split in the circuits concerning the permissible scope of government employee preclearance review procedures.

The holding of the U.S. Court of Appeals for the District of Columbia Circuit in this case creates a direct conflict with the decision of the U.S. Court of Appeals for the Fourth Circuit in *U.S. v. Marchetti*, 466 F.2d 1309, 1313 (4th Cir. 1972), *cert. denied*, 409 U.S. 1063 (1972). The court in *Marchetti* addressed the appropriate scope of preclearance review procedures in the context of government employment. The court in *Marchetti* limited the scope of preclearance review procedures to reviewing material for classified information. The Fourth Circuit in *Marchetti* reasoned as follows:

> We readily agree with Marchetti that *the First Amendment limits the extent to which the United States*, contractually or otherwise, *may impose secrecy requirements upon its employees and enforce them with a system of prior censorship. It precludes such restraints with respect to information which is unclassified* or officially disclosed . . . .

U.S. v. Marchetti, 466 F.2d at 1313 (emphasis added).

The *Marchetti* decision stands for the proposition that government employees maintain the "right to publish unclassified information" free from a prior review requirement. *Snepp v. U.S.*, 444 U.S. 507, 521, n. 11 (1980)(J. Stevens dissenting). However, the majority opinion in this case did not place any limits on the scope of material a government censor could review in a preclearance process. In conflict with

Marchetti, the court below held that government censors could review potential publications, not just to insure that classified material is not disclosed, but also to review and comment on the opinions, factual findings and ideas of the author. Such a wide scope of review is also inconsistent with the basic principle behind this Court's holding in *Snepp v. U.S.*, 444 U.S. 507 (1980).

This Court should review this case to resolve the conflict in the circuit courts of appeals and to establish an uniform standard for reviewing prepublication review procedures. Even the majority decision in this case recognizes that the prior decisions regarding preclearance review procedures for government employees have "not been uniform." App., *infra*, 20a.

IV.

The court of appeals decision directly conflicts with this Court's prior decisions regarding the permissible interpretation of statutes and regulations.

The court of appeals panel which decided this case below could not agree on how to interpret the FAM regulations. The panel majority interpreted the regulations as requiring the submittal of speech for prior review, but as not authorizing the government to punish an employee merely for publishing material where clearance was denied. App., *infra*, 11a-19a. Judge Wald, in dissent, vigorously disagreed with this interpretation. App., *infra*, 29a-43a.[6/] The lower court

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[6/] Judge Wald found that the "majority's opinion is a triumph of judicial

(continued...)

recognized that if the FAM regulations were interpreted in a manner consistent with Judge Wald's dissent, it would be "doubtful" that they could survive the *Pickering* balancing test. App., *infra* 12a-13a.

Consistent with Judge Wald's dissent, the challenged preclearance regulations do in fact prohibit an employee from publishing material of "official concern" until that material has been cleared by a government censor. The meaning of the regulations is plain and understandable:

> *No employee shall publish* any material of official concern under paragraph (a) until it has been cleared.

3 FAM § 628.2b (emphasis added).

The regulations also spell out, in plain language, what conditions must be met in order for an author to have his or her speech cleared:

> *Clearance will not be granted until* all classified material and *all material of official concern* under paragraph (a) *which is inaccurate, inconsistent with current foreign policy*, or can reasonably be expected to affect adversely U.S. foreign relations *has been deleted from the proposed speaking, writing, or teaching material.*

(...continued)
inventiveness. In a credulity-defying exercise, my colleagues conclude that the challenged prepublication clearance regulation permits the VOA only to require review of employee-authored publications . . . not to forbid publication of manuscripts . . . ." App., *infra*, 24a.

3 FAM § 628.2c (emphasis added).

Thus, in order to clear speech for publication, an author is required to delete various materials which a government censor determines to be "inaccurate" or "inconsistent with current foreign policy" or material which would "affect adversely U.S. foreign relations." Additionally, the regulations explicitly state that the government's "institutional judgment" takes precedence over the opinions of an individual author in determining what is "accurate" or what is "inconsistent" with foreign policy. 3 FAM § 628. An employee is explicitly prohibited from publishing uncleared material. As set forth in Judge Wald's dissent, the record in this case fully supports this interpretation of the statute. App., *infra*, 30a-31a .

The majority's decision below directly conflicts with this Court's prior decisions concerning the interpretation of regulations which impact on speech. Specifically, in order to narrow the construction of a law, the statute or regulation in question must be "readily susceptible" to such a narrowing construction. A court cannot "rewrite" a law "to conform it to constitutional requirements." *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 397 (1988). Additionally, Judge Wald, in her dissent, carefully explained how the majority's construction of the challenged regulation was "directly contrary to the Supreme Court's holding in *Keyishian v. Board of Regents*, 385 U.S. 589 (1967)."App., *infra*, 42a.[7/]

[7/]If the FAM regulation was read in a manner consistent with this Court's holding in *Keyishian*, the regulation would unquestionably be unconstitutional. Significantly, as fully set forth in her dissent, even if this Court were not to grant certiorari on this issue, the regulation would still constitute an unconstitutional disincentive on speech and conflict with other decisions of the Court. See generally App., *infra*, 43a-60a. For example, in

(continued...)

V.

The majority decision of the court of appeals directly conflicts with the decisions of this Court concerning the procedural safeguards which must exist in speech restrictions that constitute prior restraints.

This Court has consistently required prior review schemes to adhere to the strictest procedural safeguards in order to prevent improper censorship. There is absolutely no reason to relax these requirements under a *Pickering* analysis or in cases concerning prior review of government employee speech.

In *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 599 (1975), this Court recognized the "settled rule" that a "system of prior restraint 'avoids constitutional infirmity *only* if it takes place under procedural safeguards designed to obviate the damages of a censorship system.'" *Southeastern Promotions*, quoting from *Freedman v. Maryland*, 380 U.S. 51, 58 (1965)(emphasis added).. The Court recognized that when

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(...continued)

Bantam Books v. Sullivan, 372 U.S. 58 (1963), the prior review scheme concerned an anti-pornography review commission which lacked power to apply "formal legal sanctions." *Id.*, 372 U.S. at 66-67. The commission did not have the authority to prohibit the sale or distribution of any book, it did not have the authority to criminally or civilly prosecute a person who distributed pornography and it could not terminate or discipline any employee who wrote, sold or distributed pornography. In fact, the censorship powers granted the executive under the FAM regulations (which includes the power to discipline employees who fail to comply with those regulations) are greater than the advisory powers granted the pornography commission in *Bantam Books*, which were found to be unconstitutional. Despite the narrow powers of the anti-pornography commission at issue in *Bantam Books*, the Supreme Court enjoined the "informal censorship" in that case. *Id.*, 372 U.S. at 67, n.7.

speech must be submitted for governmental approval prior to publication, "the risks of freewheeling censorship are formidable." *Southeastern Promotions*, 420 U.S. at 559.

Likewise, in *Bantam Books* this Court was very careful to insist that regulations of obscenity "scrupulously embody the most rigorous procedural safeguards." *Bantam Books v. Sullivan*, 372 U.S. 58, 66 (1963). The court noted that "freedoms of expression in general" are "vulnerable to gravely damaging yet barely visible encroachments." *Id.*

In this case, there are no "procedural safeguards" protecting employee expression. On their face, the regulations require that the employee obtain the needed clearances to publish speaking, teaching or writing materials from a variety of agency departments, including their own management and the public affairs office. The approval process for unofficial writing material is set forth in 3 FAM § 628.5-3, which in turn requires employees to obtain clearances in accordance with 3 FAM §§ 628.5-2 and 628.3-1a. There are no set guidelines which govern the discretion of the censor at any step in this process. Not only are the censors not prohibited from employing a viewpoint-based criterion when reviewing the proposed speech, the text of the regulations requires the censors to apply such a criterion. 3 FAM §§ 628b and 628c. The near absolute discretion the government enjoys under these regulations, combined with the total lack of procedural safeguards ensuring that the First Amendment rights of employees are not violated, renders the FAM prior review regulations unconstitutional and the decision below in conflict with prior decisions of this Court.

VI.

The decision below conflicts with the reasoning contained in the *Pickering/NTEU* line of cases .

Government employee speech on matters of public concern is protected under the First Amendment. *Pickering v. Board of Education*, 391 U.S. 563 (1968). However, because of the government's interest as an employer, some restraints upon speech of government employees may be valid, even if they would be "plainly unconstitutional if applied to the public at large." *U.S. v. NTEU*, __ U.S. __, 115 S.Ct. 1003, 1012, 130 L.Ed. 964, ___ (1995). To determine the validity of a restraint on the speech of government employees under the *Pickering* analysis, a court must "arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering v. Board of Educaiton*, 391 U.S. 563, 568 (1968).

In NTEU, the Supreme Court refined the *Pickering* balancing test to address cases involving regulations that are a "wholesale deterrent to a broad category of expression by a massive number of potential speakers." *NTEU*, 115 S.Ct. at 1013. The Court found that the *Pickering* line of cases primarily involved a post hoc analysis of one employee's speech and its impact on that employee's public responsibilities. *Id.* It reasoned that since the challenged regulation had such a widespread impact on expression, the potential to chill speech was greater than an adverse action against one employee. *Id.*, 115 U.S. at 1014. Thus, a greater burden was placed on the government. To prevail, the government was required to set forth evidence "show[ing] that the interests of both potential

audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's necessary impact on the actual operation' of the government." *Id.*

The FAM preclearance regulations conflict with the test enuncated by this Court in *NTEU*. Like the regulation at issue in *NTEU*, the FAM regulations impact a vast group of employees in a broad range of expression. Since the regulations are a wholesale deterrent to a broad category of expression by a vast number of potential speakers, even if this Court were not to articulate a separate standard for viewpoint and content based prior restraints on government employee speech, the FAM regulations can not withstand scrutiny under the *Pickering/NTEU* balancing test. App., *infra*, 43a (J. Wald dissenting).

It is well settled that "federal employees who write for publication in their spare time have made significant contributions to the marketplace of ideas." NTEU, 115 S.Ct. at 1012, *Accord Waters v. Churchill*, ___U.S.___, 114 S.Ct. 1878, 1887 (1994) ("Government employees are often in the best position to know what ails the agencies for which they work, public debate may gain much from their informed opinions."). It is critical that the expressions on matters of public concern made by federal employees flow freely and easily into the marketplace of ideas.

In this case, the challenged FAM regulations explicitly target speech which is of public concern. Speech related to U.S. foreign policy is, by its very nature, of public concern. Likewise, employee "whistleblowing" on the alleged improper activities of a government employer, such as the criticisms of VOA contained within Ms. Weaver's article, squarely fall within the constitutionally protected scope of federal employee

speech. Thus, the public-at-large has a strong interest in obtaining access to the very type of materials targeted for prior review under the FAM regulations.

The interest of Ms. Weaver, other similarly situated government employees and the general public in communicating or reading non-confidential matters covered under the FAM regulations is beyond question. The public has an overwhelming interest in obtaining access to the uncensored private speech of federal employees. Employees have an overwhelming interest in being able to write, speak and teach in a manner which does not require their employer to review the content of their private opinions and private writings.

Unlike the facts in NTEU, here the government has cited to no empirical evidence, no study, no Congressional hearing and no "blue ribbon" commission findings to justify the breadth and scope of the FAM preclearance regulations. Additionally, unlike the narrow restrictions upheld in *Snepp* and *Marchetti*, the FAM regulations are not tailored to address the government's legitimate interest in preventing the improper disclosure of classified information. Indeed, other regulations and requirements which apply to federal employee disclosure of classified information are not challenged in this case.

More significantly, that the regulations apply to "all" employees of the covered agencies, regardless of rank, and apply to all publications, regardless of where that publication is made, renders the actual harm the government is attempting to stop meaningless. For example, a letter to the editor regarding NAFTA, appearing in a local newspaper in Oshkosh, Wisconsin, written by an employee of equal status to that of Ms. Weaver (with the accompanying required disclaimer) could not conceivably create a real harm to the government. However, denying the citizens of Oshkosh, Wisconsin the

views of that employee, would create a real and tangible harm to those citizens.

Likewise, if Ms. Weaver were to take an adjunct teaching position with a local community college, and she wanted to give a lecture on the Middle East peace process, requiring Ms. Weaver to have her course outline and content to be reviewed and "cleared" by a government censor would not realistically address any legitimate interest of the U.S. government. However, once again, the interest of the students and the teacher would be seriously infringed upon. In fact, the government's authority, vested through the FAM regulations, would infringe upon basic principles of academic freedom integral to the educational process.

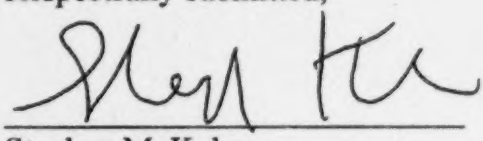
The regulations constitute an incredibly large viewpoint based censorship scheme which impacts on the flow of information to millions of American students, scholars and voters. Such a censorship regime does not serve any legitimate government interest in a democratic society.

After analyzing the competing interests of the general public and federal employees on the one hand, and the U.S. government on the other hand, the dissenting opinion before the court of appeals correctly found that the FAM preclearance review regulations could not pass muster under the balancing required by this Court under *National Treasury Employees Union,* ___ *U.S.* ___, 115 S.Ct. 1003, 130 L.Ed. 964 (1995). App., *infra*, 55a. p. 1454 ("Because the government has shown no legitimate interests, 'efficiency' or otherwise, to justify this review, even a mild intrusion would tip the balance under *Pickering/NTEU* toward a finding of unconstitutionality. But this regulation, however construed, represents far more than a [mild deterrent on speech]").

CONCLUSION

For these reasons, Carolyn Weaver's petition for writ of certiorari should be granted.

Respectfully submitted,



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Dated: January 28, 1997

APPENDIX

Appendix

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 31, 1995 Decided July 9, 1996

No. 94-5406

CAROLYN WEAVER,
APPELLANT

v.

UNITED STATES INFORMATION AGENCY,
JOSEPH DUFFEY, DIRECTOR, USIA,
THE VOICE OF AMERICA,
RICHARD CARLSON, DIRECTOR, VOA,
UNITED STATES DEPARTMENT OF STATE,
WARREN CHRISTOPHER, SECRETARY OF STATE,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 88cv01790)

Stephen M. Kohn argued the cause and filed the briefs for appellant.
Elaine D. Kaplan argued the cause for amicus curiae National Treasury Employees Union. With her on the brief were *Gregory O'Duden* and *Barbara A. Atkin.*

R. Craig Lawrence, Assistant United States Attorney, argued the cause for appellees. With him on the brief were *Eric H. Holder, Jr.*, United States Attorney, and *Carol B. Epstein*, Assistant General Counsel, United States Information Agency.

Before: WALD, SILBERMAN and WILLIAMS, *Circuit Judges.*

Opinion for the court filed by *Circuit Judge* WILLIAMS.

Dissenting opinion filed by *Circuit Judge* WALD.

WILLIAMS, *Circuit Judge*: Employees of the State Department, the United States Information Agency ("USIA"), and the Agency for International Development ("AID") are required to submit all speaking, writing, and teaching material on matters of "official concern" to their employers for review prior to publication. 3 Foreign Affairs Manual ("FAM") §628.2. Material of "official concern" is broadly defined to include any material related to the employee's agency or U.S. foreign policy, as well as any material that "reasonably may be expected to affect the foreign relations of the United States." Id. Appellant Carolyn Weaver, a part-time employee of the Voice of America ("VOA"), a unit of USIA, published an article in the *Columbia Journalism Review* in 1988 without submitting it for prepublication review. The article, "When the Voice of America ignores its charter-An insider reports on a pattern of abuses," attacked VOA over a range of issues, from allegations that it communicated "coded signals" to Solidarity activists (by playing a song from a Rod Stewart album) to more conventional assertions of politicization. She and USIA agree that the article contained material of "official concern." An agency official read her an oral admonishment for her failure to

honor the prepublication review requirement.

Even before receiving the admonishment, Weaver filed suit challenging the review procedure on First Amendment grounds and seeking declaratory and injunctive relief. That claim remains as Count I of her amended (post-admonishment) complaint. Count II attacks the oral admonishment. Count III in part repeats Count II's demand for relief from the oral admonishment, and, together with Count IV, seeks documents and fee waivers under the Freedom of Information Act. Weaver evidently secured at least some of her FOIA objectives and does not here pursue any unfulfilled ones. The district court granted the government's motion for summary judgment on Weaver's remaining claims, finding that the review requirement did not impermissibly infringe her free speech rights. *Weaver v. Wick,* No. 88-1790 (D.D.C. Nov. 18, 1994).

The threshold issue on appeal is whether Weaver's failure to exhaust her administrative remedies for the oral admonishment deprives the court of jurisdiction. We find that it does as to Counts II and III of the complaint, and thus we affirm the dismissal of those counts without reaching their merits. Count I, however, stands independently of the oral admonishment as a general First Amendment challenge to the prepublication review scheme, and therefore it raises no exhaustion problem. On the merits of Count I, we find that the review requirement, which we interpret narrowly to avoid constitutional difficulties, does not violate the First Amendment.

I. Exhaustion Requirement

A. *Availability of Administrative Remedies.*

Non-judicial remedies for adverse personnel decisions by government employers stem from two sources: the Civil Service Reform Act ("CSRA") of 1978, Pub. L. 95-454, 92 Stat. 1111 (codified as amended in scattered sections of 5 U.S.C.), and provisions of collective bargaining agreements affording grievance rights to covered employees (the latter strongly bolstered by the CSRA itself). See *Suzal v. Director*, USIA, 32 F.3d 574, 578-82 (D.C. Cir. 1994). In this case only the CSRA's direct remedies are relevant; the collective bargaining agreement covering Weaver and other members of the bargaining unit of Local 1812 of the American Federation of Government Employees expressly exempts "admonishments" from the category of personnel actions giving rise to grievance rights. Negotiated Labor- Management Agreement Between United States Information Agency and American Federation of Government Employees, Local 1812, Art. XXIII, § 2(b).

The CSRA provides remedies for any "prohibited personnel practice." Such practices include "tak[ing] or fail[ing] to take any ... personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in section 2301 [of title 5]." 5 U.S.C. §§ 2302(a)(1) & (b)(11). Among the merit system principles in ° 2301 is the requirement that all employees be treated "with proper regard for their privacy and constitutional rights." Id. § 2301(b)(2). So it is a "prohibited personnel practice" to take a personnel action that unconstitutionally burdens an employee's speech. *Suzal*, 32 F.3d at 580; *Spagnola v. Mathis*, 859 F.2d

223, 225 & n.3 (D.C. Cir. 1988).

It also appears that an admonishment is a "personnel action" (and thus the sort of act that can qualify as a "prohibited personnel practice") as the term has been interpreted by the Merit Systems Protection Board ("MSPB"), the administrative body charged with implementing the CSRA. The statute defines "personnel action" to include "an action under chapter 75 of this title [governing dismissals, suspensions, grade or pay reductions, and furloughs] *or other disciplinary or corrective action*." 5 U.S.C. § 2302(a)(2)(iii) (emphasis added). The MSPB at one time applied the principle of ejusdem generis to read "other disciplinary or corrective action" as limited to acts "in the nature of a Chapter 75 action," i.e., acts of a similar type and seriousness. *Caddell v. Dep't of Justice*, 52 MSPR 529, 532-33 (1992). Now, however, it views admonishments as "personnel actions" and apparently does not distinguish between oral and written ones. *Cochran v. Dep't of Veterans*, 67 MSPR 167, 174 (1995) (letter of admonishment); *Gonzales v. Dep't of Hous. & Urban Dev.*, 64 MSPR 314, 319 (1994) ("an official reprimand"). The MSPB's interpretation is entitled to deference. *Lovshin v. Dep't of the Navy*, 767 F.2d 826, 840 (Fed. Cir. 1985). Thus, if the review requirement giving rise to Weaver's oral admonishment is unconstitutional, as she says, then the admonishment is a "prohibited personnel practice."

Because the oral admonishment is not one of the relatively drastic personnel actions that entitle the affected employee to appeal to the MSPB, compare 5 U.S.C. §§ 4303(e), 7513(d) (permitting appeal in the case of dismissal and other serious actions), Weaver's remedy under the CSRA consists of the right to file a complaint with the Office of Special Counsel ("OSC"). Id. §1214(a)(1)(A). If the OSC finds "reasonable grounds" to believe that a prohibited

personnel practice has occurred, it must report its determination to the agency involved and the MSPB. Id. § 1214(b)(2)(B). If the agency fails to correct the practice within a reasonable period of time, then OSC may-but need not-seek corrective action by the MSPB. Id. § 1214(b)(2)(C). The OSC is required to act on allegations of prohibited personnel practices within 240 days, with an exception for situations in which the person making the allegation agrees to an extension of time. Id. § 1214(b)(2)(A).

Although the CSRA gives the OSC discretion whether to seek corrective action, our circuit's law affords employees in Weaver's position a right to federal court review of their constitutional claims at the end of the line. See, e.g., *Spagnola*, 859 F.2d at 229-30; *Griffith v. FLRA*, 842 F.2d 487, 494-95 (D.C. Cir. 1988); cf. *Webster v. Doe*, 486 U.S. 592, 603 (1988) (general presumption of reviewability for constitutional challenges). But cf. *Saul v. United States*, 928 F.2d 829, 843 & n.27 (9th Cir. 1991) (holding unreviewable a constitutional claim intertwined with a CSRA claim, and noting the departure of this circuit from other circuits' rulings on the issue); *Pinar v. Dole*, 747 F.2d 899, 909-12 (4th Cir. 1984) (similar). But first the plaintiff must exhaust available administrative remedies. *Steadman v. Governor, United States Soldiers' & Airmen's Home*, 918 F.2d 963, 967 (D.C. Cir. 1990). Weaver, in declining to challenge her oral admonishment with the OSC, indisputably failed to satisfy this requirement. The question is the effect of that failure as to each of the counts in her complaint.

B. *Failure To Exhaust.*

Under the CSRA, exhaustion of administrative remedies is a jurisdictional prerequisite to suit. Id. at 966-68; cf. *United States v. Fausto*, 484 U.S. 439 (1988) (holding that the CSRA, in failing to provide explicitly for administrative or judicial remedies for certain decisions affecting nonpreference excepted service employees, implicitly bars judicial remedies). The exhaustion requirement clearly applies to Weaver's claim for relief from the oral admonishment (which as we have seen is remediable under the CSRA), and thus Counts II and III of her complaint must be dismissed for want of jurisdiction. The exhaustion requirement generally applies as well to claims arising directly under the Constitution (such as Weaver's claim for declaratory and injunctive relief from the prepublication review requirement) when such claims are " 'premised on the same facts' " as the plaintiff's CSRA claims and "the CSRA remedy "would have been fully effective in remedying the constitutional violation.' " *Steadman,* 918 F.2d at 967 (quoting *Andrade v. Lauer*, 729 F.2d 1475, 1493 (D.C. Cir. 1984)). Here, Weaver's constitutional claim is intertwined with her CSRA claim in the most absolute manner imaginable: it is its sole basis.

But Weaver disputes the effectiveness of the CSRA remedy, saying that only a court can provide an injunction against enforcement of the prepublication review requirement. In requiring that the CSRA remedy be effective, however, we do not think *Steadman* and *Andrade* intended so high a standard, for under that standard the CSRA remedy would be inadequate whenever the plaintiff sought injunctive relief. Further, Weaver's view that the inability to grant injunctive relief is material assumes that the government would continue to enforce the review requirement even after an unreversed

administrative finding that the requirement was unconstitutional.[1] Weaver also points to the uncertainties in the CSRA remedy-the possible delays and the dependence on a favorable exercise by the OSC of its discretion whether to take the case to the MSPB. But the delays seem no more than the normal concomitant of an exhaustion requirement-perhaps less, in view of the statute's deadline for OSC action. Although the OSC discretion adds an element of uncertainty that is distinct from the ordinary vicissitudes of agency proceedings, Congress evidently thought it adequate in view of the relatively minor character of the wrongs whose redress it left to OSC discretion, perhaps fearing that a universal right of appeal to the MSPB would cause trivial claims to delay and crowd out more serious ones. In any event, in this circuit there is, as we have seen, the opportunity for judicial relief at the end of the tunnel.

Although Weaver has not established that the CSRA remedy would be ineffective, she is nevertheless entitled to pursue her non-CSRA claim for declaratory and injunctive relief without having exhausted her administrative remedies for the oral admonishment. This is so because, in contrast to

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[1]Review of MSPB decisions at the behest of the government is available under 5 U.S.C. §7703(d) if the Director of the Office of Personnel Management determines that the MSPB "erred in interpreting a civil service law, rule or regulation affecting personnel management" and that the decision will have a "substantial impact on a civil service law, rule, regulation, or policy directive." When this court had jurisdiction over appeals from MSPB decisions (prior to creation of the Federal Circuit), we entertained OPM petitions for review of MSPB constitutional determinations under the then-current version of § 7703(d), which stated the same conditions for availability of appeal. See, e.g., *Devine v. Goodstein*, 680 F.2d 243 (D.C. Cir. 1982). The Federal Circuit has also entertained such petitions, as reported in unpublished dispositions, see, e.g., *King v. Marsh*, WL 470749 (Fed. Cir. 1995), but our research has disclosed no reported cases on the issue.

the situation contemplated in *Steadman*, the count of her complaint seeking declaratory and injunctive relief stands independently of the admonishment; indeed it is virtually identical to the original complaint she filed before the oral admonishment had occurred. Thus, if we simply affirmed the dismissal of the amended complaint on exhaustion grounds, Weaver would be free to-and almost certainly would-promptly refile her complaint shorn of references to her refusal to observe the review requirement and the resulting admonishment. As in *United States v. Nat'l Treasury Employees Union,* 115 S. Ct. 1003 (1995) ("NTEU"), and *Sanjour v. EPA*, 56 F.3d 85 (D.C. Cir. 1995) (en banc), the district court would have jurisdiction over such a suit, framed as a simple pre-enforcement attack on a regulation restricting employee speech. This feature of Weaver's challenge distinguishes it from the ordinary case of a failure to exhaust CSRA remedies, in which the employee would have no claim that she could file directly in federal court if isolated from her claims for relief from a personnel action against her. We see no reason for disabling Weaver from pursuing in federal court a constitutional claim that under First Amendment principles is as final, ripe and free from exhaustion difficulties as it need be, and that she has standing to pursue, merely because she has also experienced a personnel action related to that claim.[2]

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[2]We recognize that separate adjudication of Count I might, through issue and claim preclusion doctrines, affect the viability of Weaver's quest for relief from the oral admonishment. But Weaver has signaled reasonably clearly that she has no objection to taking such risk. First, her reply brief identifies as the "gravamen" of her case the general challenge to the review requirement, as distinguished from the challenge to the particular personnel action taken against her. Reply Brief at 11. Second, after oral argument the National Treasury Employees Union ("NTEU"), as amicus on Weaver's side, filed a supplemental brief stating that Weaver was "not really looking for" a "reversal" of the oral admonishment (indeed, as NTEU points out, it

Accordingly, we affirm the dismissal of Counts II and III of the complaint on exhaustion grounds and proceed to the merits of Count I.

II. Constitutionality of the Review Requirement

A. *The Meaning of the Regulation.*

The central provision of the prepublication review scheme is § 628.2:

> a.... All speaking, writing, and teaching materials which may reasonably be interpreted as relating to the current responsibilities, programs, or operations of any employee's agency or to current U.S. foreign policies, or which reasonably may be expected to affect the foreign relations of the United States are of official concern and shall be submitted ... for clearance by the employee's agency, whether the employee is acting officially or privately.
>
> b. No employee shall publish any material of official concern under paragraph a until it has been cleared. The purpose of this clearance requirement is to substitute the agency's institutional judgment for the employee's judgment when the question involved concerns either the release or accuracy of information concerning the employee's agency's responsibilities or

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is unclear how such a reversal could be accomplished), but rather was seeking a general invalidation of the review scheme. Supplemental Brief of NTEU as Amicus Curiae at 7. This brief, purporting to voice Weaver's preference, was served on Weaver's counsel--who had cooperated with amicus at least to the extent of ceding amicus half his oral argument time--and elicited no response from Weaver.

> what conclusions should be drawn from such information....
>
> c. Clearance will not be granted until all classified material and all material of official concern under paragraph a which is inaccurate, inconsistent with current foreign policy, or can reasonably be expected to affect adversely U.S. foreign relations, has been deleted from the proposed speaking, writing, or teaching material.
>
> ...

3 FAM § 628.2 (contained in 3 FAM Appendix A to Subchapter 4100.[3]

The meaning of this provision is, as we shall see, not entirely clear. It contains two direct commands; first, paragraph "a" provides that material of official concern "shall be submitted ... for clearance by the employee's agency," and second, paragraph "b" specifies that "[n]o employee shall publish any material of official concern ... until it has been cleared." Thus, § 628.2 plainly requires (at a minimum) that employees undergo a clearance *process*, during which the agency reviews and passes upon material of official concern, before they publish such material. Weaver violated this requirement by refusing to submit her material for prepublication review.

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[3]Section 628 appears in an appendix because revised material that will take its place has not yet been "cleared for issuance." United States Department of State, Foreign Affairs Manual, Transmittal Letter PER-304 (November 8, 1995). Until that time, § 628 is "the current version in force." *Id.* Counsel for the government has informed us that "there has been no indication that the changes [in § 628] are imminent," and also that "as far as can be determined, the changes contemplated are not major." Because § 628 remains in force, its constitutionality is not moot.

The government argues that the regulation goes no further; once employees have undergone review to alert the agency to any problems in their material, § 628.2 has done its work. The regulation does not, the government says, authorize any form of punishment for publication of material disapproved by the agency, so long as it was submitted for review beforehand. Thus, on the government's view, the paragraph "b" requirement that no employee publish material of official concern "until it has been cleared" is a requirement that no employee publish such material until *completion of the review process*. The government fails to explain how paragraph "c", specifying conditions under which "clearance will not be granted," fits with its procedural interpretation of the regulation, but the two provisions can be reconciled by viewing paragraph "c" as establishing an implied safe harbor for publication of material approved by the agency under the listed criteria. Any authority the agency has to punish (or seek to enjoin) publication of disapproved material must then stem from some other source, such as the statutory prohibition on disclosure of classified information. See 18 U.S.C. § 798, *infra* note 5.

If, contrary to the government's proposed interpretation, the regulation were read to authorize punishment for publication of material disapproved under the criteria of paragraph "c"-inaccuracy, inconsistency with current foreign policy, or significant potential to affect U.S. foreign relations in an adverse manner-then the regulation would raise serious constitutional issues. For example, it is doubtful that the agency could, consistent with *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968), penalize publications devoid of non-public information, by employees with non-sensitive responsibilities (e.g., a driver, a payroll accountant), writing in a context where their statements could not possibly be viewed as representing

the agency or the United States, simply because the publication took a view "inconsistent with current foreign policy." Of course the hypothetical seems unlikely to represent a material share of enforcement activity under the regulation, and perhaps the breadth of § 628.2 might be found "reasonably necessary to protect" various government interests. NTEU, 115 S. Ct. at 1017. But even then insistence on advance approval would raise a further question, as before-the-fact condemnation of speech raises special concerns such as undue delay-the review itself plus time needed for a speaker to secure judicial relief-and stifling of expression that in hindsight would have been viewed as harmless or not worth the enforcement effort. See *Freedman v. Maryland*, 380 U.S. 51, 59 (1965) (noting deterrent effect of delay); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975) (arguing that a requirement of advance approval may shift the de facto order of the permissible). These possibilities of constitutional infirmity suggest that we should adopt the government's interpretation if we find it to be consistent with the language of § 628.2. "A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916); see also *Rust v. Sullivan*, 500 U.S. 173, 191 (1991) (recognizing the applicability of the canon to regulations as well as statutes). This rule is subject, of course, to the proviso that the interpretation adopted must be a plausible one. *Rust*, 500 U.S. at 191.

While § 628.2 has unambiguous requirements related to the review process (material "shall be submitted" for clearance), it lacks such requirements concerning the publication of unapproved material (e.g., "no employee is permitted to publish any material disapproved by the agency"). Further, as a source of substantive criteria § 628.2 is at best

obscure, at worst internally contradictory. While the "purpose" clause of paragraph "b" hones in on the accuracy of information about the employing agency's "responsibilities," paragraph "c" is addressed to consistency with current foreign policy and effect on U.S. foreign relations. If one tried to reconcile the two by reading "responsibilities" in paragraph "b" as some sort of shorthand for the policy issues highlighted in paragraph "c," one would encounter paragraph "a," which refers to *both,* presumably on the premise that they are different from each other.

To be sure, the government's interpretation of the regulation also has significant drawbacks. To begin, it requires that the term "cleared" in § 628.2b be given a different meaning from the term "clearance" in § 628.2c. While "cleared" in § 628.2b means "been through the review process" according to the government, "clearance" in § 628.2c cannot mean only that. For paragraph "c" specifies that "clearance will not be granted" until certain substantive conditions are met, and the only possible meaning of "clearance" in that context is "agency approval."

Normally, the same word appearing in different portions of a single provision or act is taken to have the same meaning in each appearance. *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932). Like all rules of statutory construction, however, this one is defeasible. Identical words may have different meanings where "the subject-matter to which the words refer is not the same in the several places where they are used, or the conditions are different, or the scope of the legislative power exercised in one case is broader than that exercised in another." Id. In *Atlantic Cleaners* the Court held that the phrase "trade or commerce" had a different meaning in §1 of the Sherman Act than in § 3

because of the difference between Congress's power to regulate interstate commerce (the basis for § 1) and its plenary power to legislate for the District of Columbia (the basis for § 3). Likewise, in *Dewsnup v. Timm*, 502 U.S. 410, 417-20 (1992), the Court gave the term "allowed secured claim" a different meaning in two subsections of the same bankruptcy provision, based on a difference in context and a reluctance to infer that Congress had altered a settled rule of pre-Code bankruptcy law. In the case of § 628.2, the uncertainty over the government's constitutional power to authorize punishment for publication of material disapproved by the agency, together with the obscurities produced by interpreting the regulation to authorize such punishment, provide a basis for adopting differing interpretations of "cleared" and "clearance" in §§ 628.2b and 628.2c.

A further difficulty with the government's interpretation is the tension between the proposed reading of "cleared" in paragraph "b" and the statement of purpose immediately following the term. A mere requirement to submit to a review process seems to fall considerably short of "substituting the agency's institutional judgment for the employee's" on the matters specified in paragraph "b". The review process does, however, assure that the agency's judgment can be *expressed* to the employee. Even if the employee disregards the judgment, she is at least fully on notice. There are, in addition, collateral advantages explored more fully in the constitutional evaluation of § 628.2 as a purely procedural constraint. See pp. 21-22 below.

On the positive side, the procedural view of § 628.2 seems the most practical of the possible readings. We have no indication that the review process is in fact a lengthy one, and where review is constrained by publication or engagement

deadlines, it seems improbable that the agency would want to place employees in breach of agency rules for publication of material that is, on close study, completely free of statements actually jeopardizing legitimate government interests. So far as appears, an agency may constitutionally discipline employees within the constraints of *Pickering* without any advance statement of criteria, on the basis of its general authority to punish behavior that disrupts its functions. Cf. *Waters v. Churchill*, 114 S. Ct. 1878 (1994) (public hospital employee discharged for performance deemed unsatisfactory because of statements made). Thus the government's interpretation does not on its face disable it from penalizing employees for any speech that substantively exceeds what is protected under *Pickering*.

Above all, the procedural interpretation is what the government itself has put forward in this litigation-and what it must adhere to in the future, at least unless it clearly announces an alternative reading. See *General Electric Co. v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995) (due process requires that an agency give parties "fair notice" of its regulatory interpretations before depriving them of property pursuant to those interpretations); cf. *Kale v. Obuchowski*, 985 F.2d 360, 361-62 (7th Cir. 1993) (describing and applying doctrine of judicial estoppel, according to which a party who prevails in earlier litigation by asserting some proposition may not seek to prevail in a later case by asserting its opposite). But cf. *United Mine Workers of Am. 1974 Pension v. Pittson Co.*, 984 F.2d 469, 477 (D.C. Cir. 1993) (noting that this circuit has "not previously embraced" judicial estoppel). Weaver has brought a suit complaining of First Amendment burdens that the government claims simply don't exist. If the government is willing to disclaim any non-procedural force in § 628.2, we see no reason to insist that it has such force.

It is true that the government's procedural interpretation of the regulation was advanced only in this litigation, and that VOA had in fact adopted an alternative interpretation in an internal directive. See VOA Directive D-1731A at 6 (Nov. 24, 1986) (stating that employees must obtain "specific advance *approval*" before publishing material of official concern and that "[a]pproval will not be granted" unless the criteria in § 628.2c are satisfied) (emphasis added). However, neither of the two reasons we have previously identified for cautious treatment of agency positions advanced by counsel in litigation applies here. See *FLRA v. Dep't of Treasury*, 884 F.2d 1446, 1455-56 (D.C. Cir. 1989).

First, there is no significant concern that judicial reliance on the interpretation of counsel (the United States Attorney) will have a significant lock-in effect on the relevant agencies, sticking them with an interpretation that they had not themselves espoused. See *id.* at 1455. Any of these agencies-the State Department, USIA, and AID-could easily promulgate an interpretation of § 628.2 different from that offered by counsel (or indeed could promulgate a different rule altogether). Because the regulation governs agency personnel, the controlling agencies may amend or alter their interpretations of it without advance notice and comment rulemaking procedures. See 5 U.S.C. § 553(a)(2). We note, however, that, until such an express interpretation or amendment occurs, the interpretation proposed by counsel will be binding on all of the defendants here-the State Department and USIA as well as VOA. Compare Dissent at 11 n.8.

The second reason for hesitance about positions advanced in litigation-that they may reflect a short-circuiting of statutory decision processes or may contradict authoritative agency interpretation or practice, see id. at 1455-56; see also

Church of Scientology of Cal. v. IRS, 792 F.2d 153, 165 (D.C. Cir. 1986) (en banc) (Silberman, J., concurring)-also does not apply. The VOA Directive-which clearly does not bind USIA apart from its VOA division and thus cannot be said to represent an "agency" view-is not such an authoritative interpretation, and there is no hint in the record that one exists.

So far as the application of § 628.2 is concerned, the record is almost completely barren. According to a 1988 affidavit from the acting director of the staff of VOA's Office of External Affairs, which administers § 628 for the VOA, there was at that time no instance in the institutional memory of the office (stretching back about five years) in which a VOA employee had refused to make changes requested by the agency. Affidavit of Robert T. Coonrod at 2 (July 8, 1988). Of course, that may only show the regulation's in terrorem effects-employees may have made changes out of fear of punishment-but it is also fully consistent with agency counsel's proposed interpretation.

The record does reveal one application of § 628.2, and that instance is in complete conformity with the government's view of the regulation. Although exhaustion requirements prevent our adjudication of Weaver's oral admonishment claim, the admonishment is available as evidence of the agency's behavior under the regulation. The admonishment-of which she was given a written copy-chastises her only for having published her article "without proper clearance *procedures*" (emphasis added), referring to § 628.2b. It makes no mention of substantive violations, though it seems highly improbable that the agency regards Weaver's analysis of the playing of Rod Stewart songs, etc., as satisfying all the criteria in § 628.2 that seem to speak to substance-accuracy (in both raw facts and conclusions), and conformity with the VOA's responsibilities

and current U.S. foreign policy.

Accordingly, in light of the constitutional difficulties entailed by reading § 628.2 more broadly than suggested by the government, we adopt its interpretation. We are, quite simply, reluctant to find burdens on speech that the government eschews any intention to impose. Our dissenting colleague would find such burdens (and appears to view our adherence to an interpretation limiting the impact on employees as somehow "fundamentally unfair" to employees), apparently because the regulation as written "chill[s] free speech from employees who have in the past and may in the future reasonably *believe* [it] requires them to make changes in their manuscripts to gain 'clearance.'" Dissent at 11 (emphasis in original). We have two responses to this view. First, to the extent it addresses employees who do not learn of judicial decisions involving their First amendment rights (and thus may perceive § 628.2 to require more than submission to the prepublication review process), the problem would exist even if we found § 628.2 unconstitutional. For even when a regulation is found invalid, the government is not required (so far as we know) to issue a formal retraction of the objectionable provision or a new, cleansed edition of its regulations. Cf. Exec. Order No. 12,836, 58 Fed. Reg. 7045 (1993) (revoking requirement that unionized contractors on federal projects post notices informing workers of their First Amendment rights under *Communications Workers of Am. V. Beck*, 487 U.S. 735 (1988)).

Second, the canon favoring construction to avoid constitutional difficulties will generally run the risk that there will be inadequately informed subjects of the regulation, for the interpretation adopted will be generally other than the most obvious one-indeed, may be quite non-obvious. See, e.g., *Public Citizen v. Department of Justice*, 491 U.S. 440, 455,

462-63, 466 (1989) (rejecting "plain-meaning" rule to avoid constitutional difficulties). Yet the Supreme Court has applied the cannon in the First Amendment context-indeed, in cases involving employees' First Amendment rights. See *International Ass'n of Machinists v. Street*, 367 U.S. 740, 749-50 (1960). Our application of the constitutional avoidance canon to § 628.2 is unexceptional. Having adopted the government's proposed interpretation of the regulation, we now proceed to the merits of the First Amendment claim.

B. *First Amendment Analysis*

Restraints on the speech of government employees on "matters of public concern" are governed by a balancing test; they are permissible where the government interest in "'promoting the efficiency of the public services it performs through its employees'" outweighs the interests of prospective speakers and their audiences in free dissemination of the speakers' views. NTEU, 115 S.Ct. at 1012-14 (quoting *Pickering*, 391 U.S. at 568). Where a restraint is accomplished through a generally applicable statute or regulation, as opposed to a particularized disciplinary action, we must also make sure that the regulation's sweep is "reasonably necessary to protect the efficiency of the public service." NTEU, 115 S. Ct. at 1017.

It is unclear how (if at all) the *Pickering* balance differs where the regulation of employee speech involves some form of prior restraint, such as the present pre-publication review procedure. The few cases in which the question has arisen concern actual prohibition of speech, not merely prepublication review, and the test in these cases has not been uniform. In two cases, *Snepp v. United States*, 444 U.S. 507 (1980), and *Zook v. Brown*, 865 F.2d 887 (7th Cir. 1989), the courts essentially

applied *Pickering*. In *Snepp* the Court considered a provision forbidding publication of CIA-related material by any current or former CIA employee unless the agency determined in advance that the material did not contain any classified information. 444 U.S. at 507-08. The Court seemed to view the provision as obviously constitutional; its brief analysis noted that because Snepp was an employee of the CIA, the agency was entitled to "act[] to protect substantial government interests by imposing reasonable restrictions: on his speech. *Id.* At 509 n.3 (citing *Civil Service Comm'n v. Letter Carriers*, 413 U.S. 548, 565 (1973)); see *Letter Carriers*, 413 U.S. at 564-67 (stating and applying *Pickering* formulation). Likewise, in Zook, the court emphatically rejected the employee's attempt to analogize prior restrictions on his speech to the sort of classic prior restraint that under *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 716 (1931), carries a heavy presumption of constitutional invalidity. 886 F.2d at 890-91. Instead the court applied *Pickering* balancing and upheld a requirement of prior written approval for commercial endorsements by law enforcement officers. *Id.* at 8891-92.

A second type of test first appeared in the Supreme Court's decision in *Brown v. Glines*, 444 U.S. 348 (1980), which involved a service member's challenge to Air Force regulations requiring prior approval for on-base circulation of petitions. The Court seemed to apply a version of the "intermediate scrutiny" test set forth in *United States v. O'Brien*, 391 U.S. 367 (1968); it upheld the regulations, which applied to employees and non-employees alike, on finding that they "protect a substantial Government interest unrelated to the suppression of expression," and "restrict no more speech than is reasonably necessary to protect the substantial governmental interest." *Brown*, 444 U.S. at 354, 355; see also *United States v. Marchetti*, 466 F.2d 1309, 1315-17 (4th Cir.1972)(upholding

a scheme of prepublication review ans bans on CIA employee's disclosure of classified information on the ground that the government's interest in secrecy was substantial and the challenged scheme a reasonable means for protecting it). Our decision in *McGehee v. Casey*, 718 F.2d 1137 (D.C. Cir. 1983), involving a challenge to a scheme similar to that in *Marchetti*, contains strands of both *Pickering* and its progeny, and we also invoked and applied the two-part test set out in *Brown*. *Id.* at 1141-43. Cf. *Alderman v. Philadelphia Hous. Auth.*, 496 F.2d 164, 168-70, 173-74 (3d Cir. 1974)(striking down a temporary ban on all employee speech on specified matters, having used both the language of *Pickering* and a test derived from non-employment cases, requiring "compelling proof" that the restriction is "essential to a vital government interest").

Even *Brown* itself did not completely ignore the special authority of the government as employer. Responding to the employee's effort to distinguish *Greer v. Spock*, 424 U.S. 828 (1976) (upholding restrictions on speech on military bases against challenge by non-military personnel), on the ground that Spock and his associates were "civilians who had no specific right to enter a military base," the Court answered that the distinction cut the other way. The government, it said, has the authority to "subject its employees to such special restrictions on free expression as are reasonably necessary to promote effective government." Brown, 444 U.S. at 356 n.13 (citing *Letter Carriers*, 413 U.S. at 565). Thus, while the Court plainly regarded the Air Force regulations as sustainable under an *O'Brien*-type test, it at least implicitly suggested an alternative mode of analysis-the *Pickering* balance, with the detriments of prior restraints simply among the factors to be considered. There is certainly no logical reason to think that the existence of some element of prior restraint should remove a restriction on employee speech from the usual *Pickering*

approach. The importance of the employment context-implying a substantially voluntary assumption of special burdens in exchange for special opportunities, as well as the complex and subtle interests peculiar to any employer's needs in making effective use of its workforce-seems to us to dominate the special concerns about prior restraints. This is especially so because *Pickering* can readily count those concerns in the course of the balance.

Applying the test of *Pickering* and NTEU, we find that 3 FAM § 628.2 clearly passes muster. As we have said, the regulation-interpreted narrowly to avoid constitutional difficulties-requires only that employees submit to a process of prepublication review. No speech is forbidden. (The dissent's statement that the government is claiming a need to exercise "*total control over* all public speech of its employees in the foreign policy arena," see Dissent at 19 (emphasis added), might be true of the regulation as the dissent would construe it, but not of the interpretation adopted by us. Compare Dissent at 13 (apparently proposing to assess the constitutionality of § 628.2 under the majority's reading of it).) The primary burden on employees from the regulation is simply the delay associated with submitting to the review process prior to publication. If the prior review were extensive, of course, it might delay constitutionally protected speech to a time when its only relevance was to historians, see, e.g., FW/PBS, *Inc. v. City of Dallas*, 493 U.S. 215, 228 (1990), but Weaver has not alleged that the review under § 628.2 is lengthy.

Weaver argues, however, that the review process imposes burdens beyond delay because the government, though lacking the authority to prohibit publication of unapproved material, may informally pressure employees to make the desired changes. But if publication without the change could

be punished after the fact under *Pickering*, then presumably the employee is not made worse off by having advance notice of the government's view. If, on the other hand, publication of the unaltered material cannot constitutionally be punished, then the employee has nothing to fear by going ahead. The risk that tighter standards will be applied in the advance review process than would actually be applied in penalty proceedings after publication is present only in a fairly dilute form, since non-approval means only that the agency has not welcomed the material into its safe harbor. All in all, then, the delay and discouragement effects here seem a considerably milder deterrent to speech than NTEU's ban on honoraria or the limitation on reimbursement of expenses in *Sanjour*.

Our dissenting colleague says that the review process is harmful because it "alert[s] the authorities to [an] offensive publication." Dissent at 23. But that advance alert is necessary for the legitimate functions of the regulation (discussed below); so far as ability to punish the employee after publication is concerned, agencies seem likely to have many other ways of learning of their employees' publications on matters of official concern, especially ones that they find objectionable. Our colleague also argues that a reviewing official who has taken a rejectionist stance in the review process will likely persist, making ultimate punishment (on a basis independent of § 628.2) more probable. *Id.* at 23-24. We think any such increase in probability likely to be modest. Because the review process is not lengthy and takes place without the luxury of full consideration of all relevant factors, see p. 13 above, it is presumably understood as preliminary. Such processes are normally thought not to create a serious risk of prejudice in a later, "final" decision. Cf. *Withrow v. Larkin*, 421 U.S. 35, 55 (1975) (board's role as investigator and initiator of license revocation proceeding does not bar it from adjudicating the

revocation).

As to the interests supporting the requirement of prepublication review, the government identifies several ways in which it promotes efficiency in the performance of public duties. First, the process permits the government to take corrective action before the unauthorized disclosure of classified information occurs. Affidavit of Deputy Secretary of State George B. High at 1 (July 7, 1988). The Supreme Court has ranked the government's interest in protecting classified information as a compelling one. *Snepp,* 444 U.S. at 509 n.3; see also *McGehee*, 718 F.2d at 1143. While 3 FAM § 628.2 applies to personnel without direct access to classified information, High's affidavit points out that even employees without such direct access may inadvertently, and even unknowingly, come into contact with classified information. Cf. *Snepp*, 444 U.S. at 512 (employee relying on own judgment as to what is harmful to U.S. interests may overlook factors that agency's broader perspective enables it to identify).

The government also identifies other interests in support of the review requirement-as indeed it must in light of the regulation's explicit focus on such considerations as the conclusions to be drawn from information and the consistency of the employee's material with current foreign policy. See 3 FAM § 628.2b & c.[4] As High's affidavit says, the review

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[4]While the government thus acknowledges that the review scheme is in one sense broader than the provisions upheld in *Snepp*, *McGehee*, and *Marchetti*, it is also in a significant sense narrower than those provisions, which clearly intended substantive application and, in the case of *McGehee*, were in fact so applied. For this reason, the *Marchetti* court's dictum that the restraint there could not be sustained with respect to "information which is unclassified or officially disclosed," 466 F.2d at 1313, is not pertinent.

process enables the agency to "take corrective action before publication of statements ... which would insult or embarrass foreign governments or foreign leaders, adversely affecting the United States' relations with such government or leader," and to "assure that statements attributed to a [covered] employee do not confuse or mislead ... foreign governments regarding the substance of U.S. foreign policy as articulated by the President and the Secretary of State." High affidavit at 2. The government's assertion of these goals is quite consistent with its position that § 628.2 expresses no substantive veto power, for the early warning *alone* enables the government to contact foreign powers and assuage their concerns about U.S. policy. We do not at all say (nor do we think) that "hyperbole about vague and speculative damage to our foreign interests" can "justify abridgement of our *citizens'* freedoms." Dissent at 25-26 (emphasis added). We are concerned here with *employees*, whose job-related speech may be restrained in ways that would be "plainly unconstitutional if applied to the public at large." NTEU, 115 S. Ct. at 1012. And we do not see quite such a huge gap as is espied by the dissent between the interests of the State Department, USIA and AID in accomplishing their mission efficiently (a legitimate basis for restricting employees' speech) and the foreign policy interests of the United States. Compare Dissent at 14-18.

We now consider whether § 628.2 is "reasonably necessary to protect the efficiency of the public service," NTEU, 115 S. Ct. at 1017, an aspect of the *Pickering* balance addressing the fitness of the restraint to the stated goals. First, the advance nature of the review is at a minimum "reasonably necessary" to protect the government's interests. As to classified information, advance review is plainly essential to

preventing dissemination of the information.[5] And as to other sensitive material, only review before publication enables the government to take preemptive rather than merely reactive steps in response. Cf. *Snepp*, 444 U.S. at 513 n.8.

As to the duration of the review process, we have already noted that Weaver makes no claim of long delays. Of course even a short waiting period might in some cases affect the relevance of information of immediate or pressing interest, but we do not think those who have secured formal roles explicating and advancing U.S. foreign policy-or even those who have found employment in an agency charged with that role-have a transcendent interest in instant publication of statements made on agency-related matters. The delay associated with prepublication review at VOA appears likely to be greatest when perceived problems in the material necessitate consultation with the USIA's Office of Public Liaison, which in turn may consult appropriate experts. Coonrod Affidavit at 2. That may take more time than would one-stop review, but Weaver offers no reason to think that the overall process would take longer than "reasonably necessary." In any event, the Coonrod affidavit notes that consultation with the Office of Public Liaison had not been necessary in Coonrod's tenure at VOA, which the affidavit indicates had been at least two years

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[5]Disclosure of classified information is a criminal offense punishable by up to ten years' imprisonment and a $10,000 fine. 18 U.S.C. § 798. An agency confronted with a recalcitrant employee who refused to eliminate classified information might wish to seek an injunction against publication of the offending section of the employee's material. Cf. *Marchetti*, 466 F.2d at 1316-17 (permitting injunction against publication of material determined by the CIA to contain classified information on the ground that criminal sanctions for disclosure might not always deter such behavior and that, in light of the serious harm that would follow from disclosure, "more positive assurance" is warranted).

at the time of the affidavit.

It is true that § 628.2 contains no specific limit on the duration of the review process-a feature that is typically fatal outside the employment context. See FW/PBS, 493 U.S. at 226 ("[A] prior restraint that fails to place limits on the time within which the decisionmaker must issue the license is impermissible.") (citing cases).[6] But as we have seen, courts have uniformly assessed prior restraints in the setting of government employment by standards less demanding than those used for traditional prior restraints. We have found no case holding that a review process-or indeed any form of prior restraint, even one including substantive prohibition of speech-in the context of an employment relationship is constitutionally invalid for want of a specific deadline on action. Thus we reject the idea that prior review in the employment context must proceed under a pre-set time limit.

Finally, there is nothing unreasonable in the application of § 628.2 to all agency employees-even ones without direct access to classified information or sensitive foreign policy developments-because of the risk of unintended leakage of classified or other sensitive information. Indeed, the review process may be particularly important in precisely such cases, as unintended recipients of information are especially likely to have no idea that their material may harbor damaging disclosures. We do not say that the government's interests absolutely necessitate the precise contours of the review process in the case of each and every employee "from the

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[6]The record indicates that USIA imposes a 30-day limit on prepublication review, see United States Information Agency, Announcement No. 38, at 2 (Feb. 5, 1988), but does not indicate whether a similar time limit applies to State Department and AID employees.

secretary pool on up to director," see Dissent at 19, but merely that the review scheme restricts no more speech than is "reasonably necessary" to achieve the government's interests, see NTEU, 115 S. Ct. at 1017.

Accordingly, we find the prepublication review scheme valid under *Pickering* and NTEU. We affirm the dismissal of Counts II and III of Weaver's complaint on exhaustion grounds and affirm the dismissal of Count I on the merits.

So ordered.

WALD, *Circuit Judge*, dissenting: The majority's opinion is a triumph of judicial inventiveness. In a credulity-defying exercise, my colleagues conclude that the challenged prepublication clearance regulation permits the VOA only to require review of employee-authored publications and to offer advice to authors, not to forbid publication of manuscripts until agency consent has been bestowed-reaching this conclusion despite the regulation's unequivocal statements that all materials of official concern "*shall be submitted ... for clearance*," no material may be published "*until it has been cleared*," and "*[c]learance will not be granted*" until the employee has deleted all objectionable material.

The majority's interpretation is one only a lawyer could love-or comprehend. Carolyn Weaver, the non-lawyer plaintiff in this case, says she did not understand the regulation as authorizing only review and advice. Nor, so far as can be ascertained, did any other employee of the VOA read the regulation this way-for by the agency's own admission every single employee who submitted material for review subsequently made all the changes "suggested" by the official reviewers before publication. Nor has the VOA presented a

shred of evidence that *it* read the regulation in so benign a fashion before this litigation began. To the contrary, the agency issued an internal directive and circulated an annual "reminder" to its employees that they could not publish any material without agency "approval." Yet, despite the unambiguous language of the regulation, undisputed evidence that the regulation was understood by VOA employees to mean exactly what it said, and the consistent position of the VOA before this litigation that it did require agency approval of employee manuscripts before publication, my colleagues have adopted a contrary reading, offered by the agency for the first time during the course of this litigation, in an obvious attempt to save the regulation from a slam-dunk finding of unconstitutionality.

But even if the majority could distort the regulation's plain meaning and transform the proverbial sow's ear into a silk purse, by ruling that the regulation only authorizes review and advice, the magic would be for nought since, in my view, the regulation would still violate the First Amendment. The courts have consistently held that regulations which burden-even if they do not completely restrict-employees' speech nonetheless may run afoul of the Constitution. *See, e.g., United States v. National Treasury Employees Union*, __ U.S. __, 115 S. Ct. 1003 (1995) ("NTEU"); *Sanjour v.* EPA, 56 F.3d 85 (D.C. Cir. 1995) (en banc). In those cases where the government restricts the speech of its employees, it must show that the harms from reducing employees' speech are outweighed by the government's interest in efficiently carrying out its mission by minimizing harms that "are real, not merely conjectural." NTEU, __ U.S. at __, 115 S. Ct. at 1017 (quoting *Turner Broadcasting System, Inc.* v. FCC, 512 U.S. __, __, 114 S. Ct. 2445, 2450 (1994) (Kennedy, J., plurality)).

Here, the government has offered us no more than a few vague statements about speculative damage to the foreign relations of the United States to justify a formidable restriction on its employees' speech. With the possible exception of review for the inadvertent disclosure of classified information, the VOA has failed to meet its burden of showing harms that "are real, not merely conjectural," because the alleged harms do not implicate the interests of the VOA *as an employer* in carrying out its operational mission. On the other hand, even as (mis)construed by the majority, the regulation significantly chills free speech by requiring the submission of all employee-written articles on subjects of "official concern" for prepublication review and critique, thus increasing the likelihood of subsequent sanctions for any non-redacted publication, and "inducing excessive caution in the speaker." *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations,* 413 U.S. 376, 390 (1973). Under either the majority's highly questionable interpretation of the regulation, or the ordinary reading anyone outside this litigation would give it, the regulation is unconstitutional.

A. *Interpreting the FAM regulation*

The first question in this case is whether the FAM regulation authorizes the government to *prohibit* the publication of offensive materials, i.e., to say that material may not be published and to punish an employee if such prohibition is defied, or whether it merely authorizes the VOA to *review* publications and make comments or suggestions to the author about any objectionable content. My colleagues concede that if the regulation allowed the government to punish employees for publishing over agency objections, it "would raise serious constitutional issues," Majority opinion ("Maj. op.") at 10, a conclusion mandated by our prior declaration in *McGehee v.*

Casey, 718 F.2d 1137, 1141 (D.C. Cir. 1983): "The government has no legitimate interest in censoring unclassified materials." The only possible way out of this precedential corner for the agency and my colleagues is to construe this regulation as authorizing the agency only to review publications and make non-binding suggestions, while allowing the employee to publish over agency objections (with the risk of post-publication sanctions based on the material's content, but without the possibility of discipline merely for defying the censor's recommendations).

Predictably, the majority reads the regulation precisely this way. Relying on the canon that "[a] statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score," my colleagues conclude that the regulation permits the government only to offer advice, not to threaten discipline for publication in the event the advice is rejected. *See* Maj. op. at 11 (quoting *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916)).

I strongly disagree with my colleagues' interpretation of the regulation. Like them, I have no desire to seek out constitutional infirmities in any governmental regulations. But there is a limit. The procrustean interpretation advanced by the majority runs completely counter to the text and plain meaning of the regulation as well as the interpretation of the regulation advanced by the agency (right up until this litigation), and the understanding of the regulation by VOA employees. Their revisionist interpretation of this regulation is a semantic wonder.

1. *The plain meaning of the regulation*

We are all familiar with the time-honored canon of construing statutes so as to avoid constitutional difficulties. But even under this canon, we must give the text a "reasonable construction." *Hooper v. California*, 155 U.S. 648, 657 (1895). Much as we might like to avoid constitutional issues, judges cannot stretch the words of a statute to the point of "disingenuous evasion." *Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 379 (1933). I repeat here the key provisions at issue to put in high relief the absurdity of the "review and advice" interpretation the majority advances. Section 628.2, entitled **"General Policy and Procedures,"** provides:

> a.... All speaking, writing, and teaching materials which may reasonably be interpreted as relating to the current responsibilities, programs, or operations of any employee's agency or to current U.S. foreign policies, or which reasonably may be expected to affect the foreign relations of the Untied States are of official concern and shall be submitted, as provided in the following pertinent sections, for clearance by the employee's agency, whether the employee is acting officially or privately.
>
> b. No employee shall publish any material of official concern under paragraph a until it has been cleared. The purpose of this clearance requirement is to substitute the agency's institutional judgment for the employee's judgment when the question involved concerns either the release or accuracy of information concerning the employee's agency's responsibilities or what conclusions should be drawn from such information....
>
> c. Clearance will not be granted until all classified material and all material of official concern under

> paragraph a which is inaccurate, inconsistent with current foreign policy, or can reasonably be expected to affect adversely U.S. foreign relations, has been deleted from the proposed speaking, writing, or teaching material.

The regulation indisputably provides: (a) All materials relating to current agency programs or U.S. foreign policy "shall be submitted ... for clearance;" (b) No material may be published "until it has been cleared;" and (c) "Clearance will not be granted" until the employee has deleted the objectionable material. The only conclusion to be drawn from (a)-(c) is that if the employee publishes material of "official concern" without prior agency approval she has violated agency regulations and can expect to be punished.

The majority nonetheless says these provisions are "not entirely clear," and goes on to construe them in a way that would require the agency to tell an employee her material "is inaccurate, inconsistent with current foreign policy, or can reasonably be expected to affect adversely U.S. foreign relations," but that she may publish it anyway, although she may later be disciplined for it. This would be true, of course, only if the regulation is construed to mean: (1) The government *may* give clearance even if the objectionable material is not deleted; or (2) The employee *may* publish the material even if she does not receive clearance. Both of these interpretations are flatly contradicted by the text of the regulation.[1]

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[1]The majority acknowledges that §1 628.2(a) *unambiguously* requires employees to submit material to a review process because that subsection says that material "shall be submitted." Maj. op. at 11. That much makes sense. But my colleagues insist that § 628.2(b) is ambiguous because "it

In order to arrive at their unnatural interpretation of the regulation, my colleagues are forced to read the word "cleared" in ° 628.2(b) to mean something entirely different from "clearance" in ° 628.2(c). See Maj. op. at 12. Thus they read "cleared" in subsection (b) to mean publication is prohibited until a manuscript has "been through the review *process*," while "clearance" in subsection (c) means "agency *approval*" will be withheld until the offensive material is deleted. *Id.* (emphases added).

This reading is of course in derogation of the familiar judicial presumption that "identical words used in different parts of the same act are intended to have the same meaning." *Atlantic Cleaners & Dyers v. United States*, 286 U.S. 427, 433 (1932); *see also Sullivan v. Stroop*, 496 U.S. 478, 484 (1990) (quoting *Sorenson v. Secretary of Treasury*, 475 U.S. 851, 860 (1986) (quoting *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 87 (1934) (quoting *Atlantic Cleaners*))). The majority, however, brushes off this line of cases, saying that "[l]ike all rules of statutory construction ... this one is defeasible." Maj. op. at 12.

The Supreme Court in *Atlantic Cleaners*, however,

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lacks such requirements concerning the publication of unapproved material." Id. That is simply not the case. Subsection (b) says, "No employee shall publish any material of official concern under paragraph a until it has been cleared...." I see no ambiguity.

The majority also gives short shrift to the second sentence of subsection (b): "The purpose of this clearance requirement is to *substitute the agency's institutional judgment* for the employee's judgment ...." (emphasis added). Maj. op. at 13. In my view, this sentence strongly suggests that these are not *suggested* changes, but rather that they are *mandated*.

identified only three situations in which the same-word same-meaning presumption would not apply: "[w]here the subject matter to which the words refer is not the same in the several places where they are used, or the conditions are different, or the scope of the legislative power exercised in one case is broader than that exercised in another...." 286 U.S. at 433. None of those rationales applies.[2] The *subject matter* of subsections (b) and (c) is identical-both deal with the prepublication clearance requirement. Similarly, there is no difference in the *conditions* under which the two subsections apply. And finally, unlike the situation in *Atlantic Cleaners*, the *power* exercised by the agency in promulgating subsection (b) is exactly the same as the power involved in promulgating subsection.[3] This is not a situation involving use of the same

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[2]The majority offers the following explanation for disregarding the presumption:

> In the case of § 628.2, the uncertainty over the government's constitutional power to authorize punishment for publication of material disapproved by the agency, together with the obscurities produced by interpreting the regulation to authorize such punishment, provide a basis for adopting differing interpretations of "cleared" and "clearance" in §§ 628.2b and 628.2c.

Maj. op. at 12-13. Neither of those rationales falls within the letter or the spirit of the exceptions articulated in *Atlantic Cleaners*. Although "uncertainty over the government's constitutional power" may tip the scales in favor of a constitutional reading where ambiguity *already exists* on the face of a statute, it cannot be used in a boot-strap attempt to *create* an ambiguity. *See Moore Ice Cream*, 289 U.S. at 379. Moreover, the majority has identified no real "obscurities" that arise out of giving the words "clearance" and "cleared" the same meaning in both sections.

[3]In *Atlantic Cleaners*, the Court held that "trade or commerce" had a different meaning in section 1 of the Sherman Act, which was based on Congress' plenary power to regulate commerce, compared with section 3,

word in two different sections of a variegated regulatory statute such as the Sherman Act. Nor is it a situation where the word in question-"clearance"-has a technical, rather than ordinary meaning. Cf. *Dewsnup v. Timm*, 502 U.S. 410 (1992) (finding that the term "allowed secured claim" could have a different meaning in different subsections of the Bankruptcy Code). "Clearance" is a commonplace word which can reasonably be expected to retain its ordinary meaning within the confines of one section of one regulation dealing with one procedure, not to take on novel and different meanings from one adjacent subsection to another without any indication to the reader that the agency *intended* different meanings to prevail. [4]

2. *The VOA's own interpretation*

The VOA never suggested before this litigation that there was any ambiguity in its prepublication clearance

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which was based on Congress' authority to enact legislation governing the District of Columbia.

[4]The majority wants subsection (b), which currently reads, "No employee shall publish any material of official concern under paragraph a until it has been *cleared* " to actually mean "No employee shall publish any material ... until it has been *through the review process.*" If the agency had really intended this meaning it could be expected to use the more natural word "submitted."

In fact, subsection (a) does say that all materials "shall be submitted ... for clearance...." If going through the process is all that is required, this word could simply have been repeated in subsection (b), thus rendering it "No employee shall publish any material ... until it has been *submitted.*" Thus subsection (a), which uses both "submitted" and "clearance" in the same sentence, is further proof that clearance was not intended to mean merely the status of having "been through the review process."

regulation, nor does the majority provide any such evidence as a launching-pad for its own latter-day interpretation. To the contrary, in an internal directive issued in 1986, two years before this litigation originated, the VOA said:

> An employee must obtain specific advance *approval* before engaging in speaking, writing, or teaching on subject matter of official concern; ... Approval will not be granted if the speech, written product, or course contains classified material or material of official concern which is inaccurate, incompatible with current U.S. foreign policy, or can reasonably be expected to affect U.S. foreign policy adversely.

VOA Directive D-1731A, *reprinted in* App. 74 (emphasis added). This directive could not be more unqualified on the point: getting *clearance* from the agency requires getting its approval before publication. Thus the regulation says "[n]o employee shall publish any material of official concern under paragraph a until it has been cleared," while the complementing directive says "[a]n employee must obtain specific advance approval." Similarly, the regulation says "*Clearance will not be granted* ...," while the directive says "*Approval will not be granted.*" [5] The VOA's pre-litigation interpretation, as expressed in the directive, is altogether consistent with the dictionary definition of "clearance" as "approval or certification as clear of objection ... permission to proceed without objection," WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 420 (1968), and is a much more natural reading

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[5]The government, perhaps unwittingly, argued in its briefs that the "power that 3 FAM § 628 confides in the agency is that of *approval or disapproval* of the submitted piece." Brief for Appellees at 14 (emphasis added).

than the majority's construction that "until it has been cleared" means "until it has been through the clearance process," whatever the outcome."[6]

My colleagues admit, "[i]t is true that the government's procedural interpretation of the regulation was advanced only in this litigation, and that VOA had in fact adopted an alternative interpretation in an internal directive." Maj. op. at 14. This is an all-time understatement, for the directive offered not an *alternative* interpretation, but a completely opposite interpretation from the position now advanced by the VOA. Nor is there any question here that the VOA previously represented that its directive-signed by Director Richard Carlson-was the official policy of the agency. Indeed, when Weaver was admonished for failure to comply with agency regulations, the VOA cited not only her violation of the FAM regulation, but her violation of the *directive*.[7]

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[6]The VOA apparently provides an appeals process for denials of clearance:

> If final Agency review results in disapproval, the author shall have the opportunity to review this determination with the Director of the Office of Public Liaison and the other reviewing officers, within 5 calendar days of notification of disapproval.

USIA Announcement No. 38 (Feb. 5, 1988), *reprinted in* App. 82. One might ask why there is any need for such a detailed review process if the agency intends to make only a take-it-or-leave-it *suggestion*.

[7]There is a curious aspect to this case involving what constitutes evidence of the current official agency position. Other than the statements of counsel in briefs and arguments, the only suggestion that the agency will not punish employees for publishing unapproved materials is the eight-year old affidavit of Robert T. Coonrod, the Executive Assistant to the Director of VOA and Acting Director of VOA's Office of External Affairs, prepared

Until today, I thought it clearly established in law that a person whose behavior is being regulated is entitled to rely on the representations made by the agency as to what the regulation means. *See Cox v. Louisiana*, 379 U.S. 559, 568-69 (1965) (individuals would "justifiably tend to rely on ... [an] administrative interpretation of how "near' the courthouse a particular demonstration might take place"); *Omnipoint Corp. v. FCC*, 78 F.3d 620, 636 (D.C. Cir. 1996) (elimination of provision "would have harmed many of the minority-owned businesses that had been relying upon the rule"); *International Union, United Automobile, Aerospace &Agric. Implement Workers of Am. v. Brock*, 783 F.2d 237, 248 (D.C. Cir. 1986) ("employers will justifiably rely on the Department's interpretation"). Apparently, the new law of this circuit is that employees are expected to disregard the plain language of regulations as well as the agency's own directives, and instead anticipate that the agency may take a 180-degree different position when called to task in court. That is just plain wrong, and cannot be the law.

Once an agency has told its employees that they cannot publish their material until it has been approved, and has in effect coerced them into changing their publications over the years to satisfy "official" concerns, it is fundamentally unfair to let the agency invoke a canon of statutory construction designed to avoid constitutional issues in order to sanitize the unconstitutional practice they have been engaged in. Here the past practice of the VOA and the text of the regulation reveal the burden on employees "too distinctly to permit us to ignore it." *Moore Ice Cream*, 289 U.S. at 379.

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in the early stages of this protracted litigation. We do not know whether Coonrod is still at VOA or whether the policy he discusses is still in place.

Justice O'Connor has pointed out, "even such an important canon of statutory construction as that favoring the avoidance of serious constitutional questions does not *always* carry the day." *Gutierrez de Martinez v. Lamagno*, __ U.S. __, __, 115 S. Ct. 2227, 2238 (1995) (O'Connor, J., concurring). In this case, using the canon to validate a deathbed conversion when the agency is finally called to account by an employee would completely pervert the function of judicial review. Our government must be accountable to its citizens, and it is antithetical to that principle to allow an agency which has maintained an unconstitutional regulation on the books for years and has repeatedly enforced it against its employees, to escape all responsibility by saying, "we're sorry; we won't do that any more." [8]

As my colleagues would have it, however, so long as the regulation is ultimately given a judicial construction that is arguably constitutional, no harm has been done. Not so. The harm consists in the chill to free speech from employees who have in the past and may in the future reasonably believe the regulation requires them to make changes in their manuscripts to gain "clearance." As the VOA candidly admits, "[t]o the

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[8]If the majority's position holds, the employees of VOA will not even have received a clear statement that the agency's past practice was unconstitutional. Moreover, the problem of the validity of this regulation may well re-occur. The FAM regulations apply not just to the VOA, but also the USAID and State Department. The majority cites no case holding that "the interpretation proposed by counsel" during litigation can bind an agency. Maj. op. at 15. Indeed, our precedents appear to point in a contrary direction. See *Florida Power & Light Company v. FERC*, No. 95-1199, slip opinion at 8, ___ F.3d ___, ___ (D.C. Cir., June 11, 1996) ("the agency runs this regulatory program, not its lawyers; parties are entitled to the agency's analysis of its proposal, not post hoc salvage operations of counsel.") (Williams, J.).

best of our recollection, no VOA employee has refused to make changes...." Coonrod Affidavit at 2, *reprinted in* App. 67. What better evidence could there be that employees for years have believed they were required to make the "suggested" changes than the fact that *every single one* complied? Indeed, if there had really been any ambiguity in the regulation as to an employee's freedom to publish manuscripts over the agency's disapproval, that ambiguity would have rendered it just as dangerous to First Amendment freedoms as a regulation which banned publication outright. The ambiguity-as this case sadly illustrates-would allow the agency to roar like a lion before its employees, and effectively censor the publication of materials it disfavors, yet retreat like a lamb when challenged in court. Ambiguous regulations which affect basic freedoms need to be rewritten, not reinterpreted.

The majority's approach, which in essence *rewards* the agency for the alleged ambiguity in its regulation, is directly contrary to the Supreme Court's holding in *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), where the Court struck down New York's teacher loyalty laws and regulations. In that case, the words "treasonable" and "seditious" were undefined, but the Supreme Court rejected the approach of giving those words the most benign possible reading, noting instead the pervasive *in terrorem* effects on the teachers occasioned by the laws. The Court said:

> When one must guess what conduct or utterance may lose him his position, one necessarily will "steer far wider of the unlawful zone...." For "[t]he threat of sanctions may deter ... almost as potently as the actual application of sanctions. The danger of that chilling effect upon the exercise of vital First Amendment rights must be guarded against by sensitive tools which

clearly inform teachers what is being proscribed.

385 U.S. at 589 (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958); *NAACP v. Button*, 371 U.S. 415, 433 (1963)). Just so here.

At the end of the day, the majority's reading so breathtakingly departs from the text of the regulation that no canon of construction can justify it. It would of course be a bit easier to defend the regulation if it only authorized review and advice. But as a court we must take regulations as we find them, and as they are plausibly read by those subject to them. It is not our proper function to "torture one poor word ten thousand ways" to save the agency's skin. JOHN DRYDEN, MAC FLECKNOE, Line 210, *reprinted in* BARTLETT'S FAMILIAR QUOTATIONS 369 (14th ed. 1973).

B. *The Constitutionality of the FAM Regulation*

Even if the majority's reading of the regulation were legitimate, its interpretation would not resolve the serious constitutional issues raised by so broad a prepublication clearance requirement. Assuming that the VOA forever after adhered to the "review and advice" interpretation it has advanced in this litigation, I still do not think that the regulation would pass constitutional scrutiny.

1. *The* Pickering/NTEU *balancing test*

This court, sitting *en banc*, recently had the opportunity to discuss at length the test to be applied to regulations governing the non-official speech of government employees. *Sanjour v. EPA*, 56 F.3d at 85. Provided that the speech at issue is on "matters of public concern," *Connick v. Myers*, 461

U.S. 138, 146 (1983), we apply the "*Pickering/NTEU*" test to any significant restraint the government places on it:

> The government must show that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's "necessary impact on the actual operation' of the government.

NTEU, 115 S. Ct. at 1014 (quoting *Pickering v. Board of Education*, 391 U.S. 563, 571 (1968)).

The duty of the courts, therefore, is to ensure that there is a proper balance between "the full protection of speech upon issues of public concern" and the "practical realities involved in the administration of a government office." *Connick v. Myers*, 461 U.S. at 154. Although courts consistently have held that the government may regulate the speech of its employees more stringently than that of the general public, they have not always made explicit the reasons for this difference. Thus the Supreme Court asked rhetorically in *Waters v. Churchill*, __ U.S. __, __, 114 S. Ct. 1878, 1886 (1994): "What is it about the government's role as employer that gives it a freer hand in regulating the speech of its employees than it has in regulating the speech of the public at large?" This is the answer the Court gave:

> [T]he extra power the government has in this area comes from the nature of the government's *mission as an employer*. Government agencies are charged by law with doing particular tasks. Agencies hire employees to help do those tasks as effectively as possible. When someone who is paid a salary so that she will contribute

> to an agency's effective operation begins to do or say things that detract from the agency's effective operation, the government employer must have some power to restrain her.... The key to First Amendment analysis of government employment decisions, then, is this: the government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer.

__ U.S. at __, 114 S. Ct. at 1887-88 (emphasis added).

This observation, in my opinion, is the key element ignored by the majority in its constitutional analysis. The government's enhanced power to regulate the speech of its employees arises not from the government's interests in avoiding embarrassment to foreign governments, or generalized harm to the United States' foreign policy interests, but only from its interests as an *employer* in "doing particular tasks ... as effectively as possible." Id.

In the case of a government agency charged with conducting our foreign affairs, the agency's interests in carrying out its mission may well overlap with the foreign policy interests of the United States. No one would quarrel with the dismissal of an Undersecretary of State who wrote an article critical of the Secretary and the government's foreign policy. But the dismissal would be warranted not because of harm to the United States' foreign policy interests *per se*, but because in this case, it would interfere with the effective operation of the State Department. As the Court said in *Waters*, "The reason the governor may ... fire the deputy is not that this dismissal would somehow be narrowly tailored to a compelling government interest. It is that the governor and the governor's

staff have a job to do, and the governor justifiably feels that a quieter subordinate would allow them to do this job more effectively." __ U.S. at __, 114 S. Ct. at 1888.

Thus the mere invocation of "foreign relations" has no talismanic significance in First Amendment jurisprudence. When an agency engaged in foreign relations wishes to justify limiting its employees' speech it must do so in light of the effective performance of its particular mission, just as an agency charged with protecting the environment can regulate the speech of its employees only if it interferes with that agency's conservationist mission. It is not sufficient for the government simply to say that every criticism of its foreign policy leadership by an employee will undermine its "important mission" or its goals of "efficiency."[9] Rather, the government must *specifically* show why speech-restricting regulations are necessary for the efficient conduct of its mission.[10]

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[9]In past eras, of course, government *was* permitted to restrict speech on this basis. It used to be the law that:

> [w]ords spoken in derogation of a ... great officer of the realm, which are called *scandalum magnatum*, are held to be ... heinous; and, ... when spoken in disgrace of such high and respectable characters, they amount to an atrocious injury: which is redressed ... on behalf of the crown, to inflict the punishment of imprisonment on the slanderer.

3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 123-24 (1768). As the Eighth Circuit succinctly noted, however, since that time, "[a] revolution intervened." *Casey v. City of Cabool*, 12 F.3d 799, 802 (8th Cir. 1993), *cert. denied*, __ U.S. __, 115 S. Ct. 325 (1994).

[10]The same principles apply to *punishment* for speech. Thus, for example, it is highly doubtful that a career employee of the Department of Labor could be fired for criticizing the President of the United States on grounds unrelated to labor policy. In such a case, the employee/employer

Thus in *Snepp v. United States*, 444 U.S. 507 (1980) (per curiam), the Supreme Court upheld the validity of a written agreement by a former CIA agent requiring him to submit all CIA-related writings for prepublication clearance by the agency, a requirement designed to ensure the protection of classified information. In its ruling, the Court took pains to point out: "Undisputed evidence in this case shows that a CIA agent's violation of his obligation to submit writings about the Agency for prepublication review impairs the CIA's *ability to perform its statutory duties.*" 444 U.S. at 512 (emphasis added). The basis for that finding included evidence that "sources" had discontinued working with the CIA after Snepp had published his book, citing fear that the CIA could not effectively keep their identities secret. Id. at 512-13. Relying on *Snepp*, our court later approved a CIA "secrecy agreement" requiring clearance of all employee publications containing classified information. *McGehee v. Casey*, 718 F.2d at 1147. See also *United States v. Marchetti*, 466 F.2d 1309, 1316 (4th Cir.) (CIA secrecy agreements "are entirely appropriate to a program in implementation of the congressional direction of secrecy"), *cert. denied*, 409 U.S. 1063 (1972). These cases all held that the CIA's interests in operating a secret intelligence-gathering agency, relying on an extensive network of informants, justified the broad prepublication clearance regulation to protect against disclosure of classified national security information and sources. Similarly, in *Brown v. Glines*, 444 U.S. 348 (1980), the Court upheld an Air Force regulation prohibiting service members from soliciting

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relationship would simply be too attenuated, and the employee's rights as a citizen would dominate. The same could not be said for the White House Chief of Staff, however. On the other hand, if the same Department of Labor employee publicly criticized her direct supervisor, she might well be subject to discipline under the *Pickering* test, for such comments would directly affect the government's interests as employer.

signatures on petitions without their commander's approval, on the basis of the " "different character of the military community and of the military mission ... [with its] overriding demands of discipline and duty.' " *Id.* at 354 (quoting *Parker v. Levy*, 417 U.S. 733, 744, 758 (1974)).

In *Snepp* and its progeny as well as in *Brown,* the governmental interests implicated by the prepublication clearance requirements were clearly articulated and strong. The Director of Central Intelligence, for example, had a specific statutory mandate to "protect[ ] intelligence sources and methods from unauthorized disclosure." 50 U.S.C. § 403(d)(3). Obviously, any disclosure of classified information "including information regarding intelligence sources and methods," *Snepp*, 444 U.S. at 511, inadvertent or not, would directly and materially affect this mission. As the Court said, "[w]hen a former agent relies on his own judgment about what information is detrimental, he may reveal information that the CIA-with its broader understanding of what may expose classified information and confidential sources-could have identified as harmful." *Id.* at 512.

Thus as a general principle, government review for classified information by agencies like the CIA does not violate the First Amendment. The VOA, however, has not convincingly demonstrated that it needs to conduct such review in the case of all its employees. The VOA is not an intelligence-gathering agency. Its mission is to distribute *public* information to the rest of the world, and it is required by its charter to adhere to *journalistic* principles, not those of spycraft.[11] Weaver, for her part, has only a "non-critical

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[11]The VOA's charter provides:

confidential" clearance, and her work consists of digesting public news information for re-broadcast. She says she has never encountered any classified information in her time at VOA, and according to her affidavit, at the time this litigation commenced the VOA operated out of a building shared with the Department of Health and Human Services at which employees did not even regularly have to present identification cards. Although the record is not at all clear on the point, I seriously question whether the government has demonstrated its need to review for classified information for *all* VOA employees.

But even if it had, that justification would not give it the right "to substitute the agency's institutional judgment for the employee's judgment when the question involved concerns either the release or accuracy of information concerning the employee's agency's responsibilities or what conclusions should be drawn from such information." 3 FAM § 628.2(b). This sweeping prepublication review based on the manuscript's

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The long-range interests of the United States are served by communicating directly with the people of the world by radio. To be effective, the Voice of America (the Broadcasting Service of the United States Information Agency) must win the attention and respect of listeners. These principles will therefore govern Voice of America (VOA) broadcasts:

> VOA will serve as a consistently reliable and authoritative source of news. VOA news will be accurate, objective and comprehensive.
>
> VOA will represent America, not any single segment of American society, and will therefore present a balanced and comprehensive projection of American thought and institutions.
>
> VOA will present the policies of the United States clearly and effectively, and will also present responsible discussion and opinion on those policies.

Pub. L. No. 94-350 (1976).

content (and the author's viewpoint and "conclusions") goes far beyond review for classified information, and is not justified by anything in *Snepp* or any other case.

2. *The Harms Here*

> The Supreme Court has said:
>
> > When the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply "posit the existence of the disease sought to be cured." It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.

NTEU, __ U.S. at __, 115 S. Ct. at 1017 (quoting *Turner Broadcasting System, Inc., v. FCC*, __ U.S. at __, 114 S. Ct. at 2470). And we must "limit our inquiry to the "interests the state itself asserts.' " *Sanjour*, 56 F.3d at 96 (quoting *Edenfield v. Fane*, 507 U.S. 761, 768 (1993)). In its brief, the government offered the following justification for the prepublication clearance regime:

> > The regulations serve a significant governmental interest unrelated to the suppression of speech. Substantial foreign policy and national security interests support the prepublication regulations. One of the paramount purposes of the regulation is to prevent the unknowing disclosure or dissemination of classified information which could harm the vital security interests of the United States.... It is also important that the Voice of America, as is succinctly expressed in its charter, is apolitical. A fundamental feature of the

> important foreign policy objectives it serves for the United States is to report to the people of other nations in a manner that is truthful, objective, reliable, and nonpolitical. The insertion of VOA or its employees into the press or public debate on a freelance basis on sensitive matters of security or foreign relations could threaten the basic purposes of VOA. Such activity could jeopardize security, disrupt foreign relations, and impair the important mission of the Agency.

Brief for Appellee at 18-19. [12]

Aside from preventing the disclosure of classified information-which might, if the VOA were to adduce convincing evidence of its need, justify a narrow review-the principal harm the agency posits is that *any* VOA employee, from the secretary pool on up to director, proffering *any* facts, classified or not, or drawing any conclusions from such facts that do not represent the agency's official version on any matter affecting foreign relations, presents a potential danger to the agency's mission. The agency is saying in effect that to perform its mission efficiently it must exercise total control over all public speech of its employees in the foreign policy arena. This is a broad definition of "efficiency" indeed, which transcends all limits derived from prior Supreme Court doctrine on government employee speech.

The Supreme Court has recognized that "[g]overnment employees are often in the best position to know what ails the

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[12]The government's justifications here are offered for the first time in this litigation. In *NTEU*, by contrast, Congress had enacted an honoraria ban in response to specific harms identified by the Quadrennial Commission on Executive, Legislative, and Judicial Salaries, and the President's Commission on Federal Ethics Law Reform. __ U.S. at __, 115 S. Ct. at 1008-09.

agencies for which they work; public debate may gain much from their informed opinions." *Waters*, __ U.S. at __, 114 S. Ct. at 1887. Yet the VOA fears "the insertion of VOA or its employees into the press or public debate on a freelance basis...." Brief for Appellee at 19. The notion that an article by a part-time employee in the *Columbia Journalism Review* containing not a shred of classified information could somehow "jeopardize security" or "disrupt foreign relations" simply has no support in this record.

Obviously it is in the nature of all prior restraints such as licensing and prepublication review that it will be harder for the government to prove the existence of specific harms from all-or even any sizeable number of publications encompassed by the regulation. The breadth of a regulation like this will inevitably restrict much, much more speech than could possibly present a risk of harm to the government's legitimate interests. That is precisely why any such prepublication review must have a narrow and well-justified objective. That is also why punishment *after the fact*-when the precise harm can be identified-is far preferable, with the exception of those rare circumstances (such as the disclosure of classified information or the exposure of government sources) where the harm is grave and irreparable.

The harms posited by the VOA do not even come close to those identified by the CIA in *Snepp* and *McGehee*. How, for example, will improper "conclusions" drawn by a lower-echelon VOA employee be likely to jeopardize national security? The VOA never tells us. How would foreign relations be disrupted by an employee's critical evaluation of the VOA's operations or programs? The VOA cites only to the affidavit of George High, Senior Deputy Assistant of State, who speculates that the FAM regulation offers the agency the

chance to take "corrective action" before publication of statements "which would insult or embarrass foreign governments or foreign leaders, adversely affecting the United States' relations with such government or leader."

We have previously noted that the concept of matters "affecting foreign relations" is an inherently vague and open-ended one, subject to abuse when it is invoked to restrict freedoms of our citizens or the press. *Zweibon v. Mitchell*, 516 F.2d 594, 653-54 (D.C. Cir. 1975) (en banc) (holding that warrant is required before wiretap is installed on a domestic organization, even if the wiretap is justified in the name of foreign intelligence gathering or national security), *cert. denied*, 425 U.S. 944 (1976). Moreover, "security" is a "broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment." *New York Times Co. v. United States*, 403 U.S. 713, 719 (1971) (Black, J., concurring.) [13] In this case, just as in *NTEU*, "[d]eferring to the Government's speculation about the pernicious effects of thousands of articles and speeches yet to be written or delivered would encroach unacceptably on the First Amendment's protections." __ U.S. at __ n.21, 115 S. Ct. at 1018 n.21.

On the other hand, the VOA does have a legitimate interest in remaining "apolitical," and, as its charter requires, avoiding a perception that it represents "any single segment of society." Arguably, this interest could be jeopardized if an employee, purporting to speak for the VOA, interjected herself

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[13]The only case cited by the government for the proposition that *foreign affairs* (as opposed to national security) issues are entitled to any sort of special consideration is *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), a case having nothing to do with the First Amendment.

"into the press ... on a freelance basis." If so, there is an effective, narrow way to deal with that problem-require employees to include a disclaimer statement with any publication of official concern. The FAM regulations do just that, mandating that employees include "a specific statement to the effect that the opinions and views expressed are the employee's own and not necessarily those of the agency." 3 § FAM 628.5-3.[14] This requirement is sufficiently narrow and is targeted toward a real harm, thus obviating in large part the need for a total content-based prepublication critique of every employee's writings.[15] The agency has not explained why this disclaimer, when combined with its unchallenged authority to impose post-publication discipline (consistent with Pickering) in those cases where an employee's writing demonstrably disrupts the agency's operations, would fail to protect its "efficiency" interests.

3. *The burdens on speech*

Because the government has shown no legitimate interests, "efficiency" or otherwise, to justify this review, even a mild intrusion would tip the balance under *Pickering/NTEU* toward a finding of unconstitutionality. But this regulation, however construed, represents far more than the "mild[ ] deterrent" the majority says it is. Maj. op. at 20.

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[14]Weaver did not comply with this requirement and does not dispute here the government's authority to discipline her for this failure.

[15]In Sanjour we said: "It is perhaps the most fundamental principle of First Amendment jurisprudence that the government may not regulate speech on the ground that it expresses a dissenting viewpoint." 56 F.3d at 85. Why then should the government be allowed to examine all employees' manuscripts before publication on the grounds that they might express a dissenting viewpoint?

In the first place, as a widespread and general restriction on speech, the regulation gives rise to "serious concerns," *NTEU*, __ U.S. at __, 115 S. Ct. at 104, and "the Government's burden is greater with respect to this statutory restriction on expression than with respect to an isolated disciplinary action." Id. In addition, this regulation is highly suspect because, "unlike an adverse action taken in response to actual speech, this ban *chills potential speech before it happens*." *Id.* (emphasis added). As the Supreme Court said in *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975), where it struck down a city's attempt to ban the musical "Hair,"

> The presumption of prior restraint is heavier-and the degree of protection broader-than that against limits on expression imposed by criminal penalties. Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand.

Id. at 558-59.

My colleagues, however, see no harm in the fact that the government can "informally pressure employees to make the desired changes." Maj. op. at 20. They explain:

> But if publication without the change could be punished after the fact under *Pickering*, then presumably the employee is not made worse off by having advance notice of the government's view. If, on the other hand, publication of the unaltered material cannot constitutionally be punished, then the employee has nothing to fear by going ahead.

Id.

The majority "presum[es]" that the government is *equally likely* to punish materials it disapproves of with or without a prepublication review process-an assumption I believe is not warranted by experience or common sense. Let us unbundle the majority's interpretation and look at its practical effects. The employee author must submit all manuscripts to a review process, after which she will be merely "informed" if there is anything in her work which is antithetical to agency policy. The reviewer will basically tell her: "We don't like part of your article, but go ahead and publish it anyway, and see what happens." Too much is left unsaid under that scenario for it to be a credible way to run an agency. The author will clearly surmise that if she publishes despite the criticism, the chances are good she will be officially sanctioned post-publication. For by submitting her work to the review, she has alerted the authorities to her offensive publication. The reviewer in turn, by dint of his prepublication determination that her article is offensive, has upped the ante, and increased the chances that he will follow through with a recommendation for sanctions if she publishes without making the changes.

As a practical matter, then, the chances of subsequent punishment are much higher once the agency has identified the material as objectionable.[16] Just as a child is more likely to be

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[16]Weaver, for example, accused the VOA of sending coded messages to Solidarity activists in Poland *via* Rod Stewart songs, and criticized the VOA director Charles Wick for using VOA resources for self-glorification, pointing out that the agency had filed nine reports on his activities in the previous year including extensive coverage of a banquet at which he was honored, which provoked the comment from one of her sources: "Is this *international* news?"

punished after doing something she was specifically told not to, than if she had done it without such warning, it stands to reason that an employee is much more likely to be punished after ignoring the agency's exhortations. This chill is significant, for "[t]he special vice of a prior restraint is that communication will be suppressed, either directly or by inducing excessive caution in the speaker...." *Pittsburgh Press Co.*, 413 U.S. at 390.

I would submit that the very *purpose* of the regulation is to induce "caution in the speaker." "Slow down," the employee is being told in so many words. "Think about our important mission here ... and how much you like your job." The effects are not hard to predict: "It would be a bold ... [employee] who would not stay as far away as possible from utterances or acts which might jeopardize his living by enmeshing him in this intricate machinery." *Keyishian*, 385 U.S. at 601; *see also NAACP v. Button*, 371 U.S. at 433 ("The threat of sanctions may deter ... almost as potently as the actual application of sanctions."). What is the purpose of the official critique unless the "informal pressure" my colleagues acknowledge is *supposed* to have a chilling effect, forcing the employee to make her decision to publish and/or perish accordingly?

Nor does the fact that the agency *might* not be able to punish the employee after publication somehow blunt the harmful effect of a mandatory prepublication review. As the majority would have it, even a stern message of disapproval should not deter any employee, if she is secure that she can

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If Weaver had been warned that these statements were "inaccurate" or drew "improper conclusions" is it reasonable that the VOA could have declined to sanction their publication later without losing face?

ultimately survive the *Pickering* test should the agency sanction her after publication. But what employee could feel safe in predicting ahead of time the outcome of that complex calculus? Apparently, for as long as anyone at VOA remembers, no employee has reached that level of security. "It is no answer to a claim of chilling effect that a court eventually will strike down the government's abuse of power." *Rafeedie v. INS*, 880 F.2d 506, 530 n.8 (D.C. Cir. 1989) (Ruth B. Ginsburg, J., concurring). For in the words of Justice Marshall:

> That this Court will ultimately vindicate an employee if his speech is constitutionally protected is of little consequence-for the value of a sword of Damocles is that it hangs-not that it drops. For every employee who risks his job by testing the limits of the statute, many more will choose the cautious path and not speak at all.

Arnett v. Kennedy, 416 U.S. 134, 231 (1974) (Marshall, J., dissenting).

* * *

The net result of this case is that the VOA-for no good reason-has in the past, and will in the future, be allowed to subject its employees to an exceedingly broad prepublication clearance requirement. The essence of the government's and majority's position is that this regime is justified because of the risk that a lower echelon, part-time employee who works for an essentially journalistic organization and who has never come into contact with classified information could somehow damage the foreign relations of the United States. I had thought that era well behind us where what is essentially hyperbole about vague and speculative damage to our foreign interests could be used to justify abridgment of our citizens'

freedoms.

The VOA has produced no evidence of any serious evil that would justify a wide-sweeping requirement of prepublication review of all publications by any employee that touch in any way on foreign affairs or other agency-related matters. Whether rewritten, as I conclude the majority has done, to provide for official reviewers to identity all facts and conclusions the agency finds unacceptable and to "suggest" their deletion but to take no further disciplinary steps until after publication-or as presented in their original form to permit sanctions for failure to delete such material-the regulation violates employees' free speech guarantees under the First Amendment. The regulation places significant burdens on employees' expressive freedoms, without any showing that the agency has a need to see and criticize articles in advance of publication in order to conduct its operations efficiently.

The affirmation of such a prepublication clearance procedure based on viewpoint and content goes far beyond any employee restriction previously upheld by this court or the Supreme Court. Only last year, the Supreme Court cautioned:

> As Justice Brandeis reminded us, a "reasonable" burden on expression requires a justification far stronger than mere speculation about serious harms. "Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women.... To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced."

NTEU, __ U.S. at __, 115 S. Ct. at 1017 (quoting *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J.,

concurring)). This case requires us to rethink that caution now, more than ever.

I respectfully but emphatically dissent.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAROLYN WEAVER,	)	
	)	
Plaintiff	)	
	)	
v.	)	Civil Action No.
	)	88-1790 (TPJ)
U.S. INFORMATION AGENCY	)	
et al.,	)	
Defendants.	)	
	)	

MEMORANDUM AND ORDER

Plaintiff Carolyn Weaver is a part-time employee of Voice of America, a component of defendant U.S. Information Agency ("USIA"). She is also an occasional author of freelance articles about the agency she submits for publication in various journals, some of which are critical of it. Weaver sues USIA here asking the Court to declare unconstitutional on its face, and to preclude its enforcement against her, an agency regulation requiring that manuscripts of freelance articles written by its employees which may be of "official concern" to the agency be submitted for clearance in advance of publication.[1] She contends that the regulation represents an infringement of her First Amendment right of free speech (and a prior restraint thereof as well). USIA responds that the regulation is a permissible condition of public employment, notwithstanding it may inhibit its employee-authors in

[1]Uniform State Department/AID/USIA Regulation, Foreign Affairs Manual, 3 FAM § 682.5-3.

expressing opinions the agency would likely regard as uncomplimentary, so long as it is not applied in an unconstitutional manner. Both parties have moved for summary judgment.[2]

The line of cases addressing the extent to which the verbal expressions of public employees enjoy constitutional protection begins with Pickering v. Board of Educ., 391 U.S. 563 (1968), and progresses through Connick v. Myers, 461 U.S. 138 (1983) and a number of subsequent cases. Those cases establish that the First Amendment protects the speech of public employees when an employee speaks "on a matter of public concern" unless her right to speak freely is transcended by a more substantial interest of the governmental employer in suppressing it to promote the efficiency with which it renders its services to the public.

Last term the Supreme Court decided the latest in the succession of such cases in Water v. Churchill, 114 S. Ct. 1878 (1994), upholding the dismissal of a nurse employed by a public hospital for speaking critically of her superiors and hospital officials to fellow employees. The nurse contended that she had spoken in the interest of improving patient care, i.e., she had spoken on a matter of public concern. Hospital authorities regarded her comments as insubordinate and disruptive. The Supreme Court stated:

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[2]Alternatively, the defendants have moved to dismiss the complaint on grounds of mootness or standing. With respect to the latter, they argue that the plaintiff lacks standing to assert her claim because she has already published an article arguably subject to the regulation without either obtaining prepublication clearance or incurring postpublication discipline for having done so. The Court disagrees. See Virginia v. American Booksellers Ass'n, Inc., 484 U.S. 383, 392-93 (1988).

> [C]onstitutional review of government employment decisions must rest on different principles than review of speech restraints imposed by the government as sovereign. the restrictions [] are allowed not just because the speech interferes with the government's operation. Speech by private people can do the same, but this does not allow the government to suppress it.
>
> Rather, the extra power the government has in this area comes from the nature of the government's mission as employer. Government agencies are charged by law with doing particular tasks. Agencies hire employees to help do those tasks as effectively and efficiently as possible. When someone who is paid a salary so that she will contribute to an agency's effective operation begins to do or say things that detract from the agency's effective operation, the government employer must have some power to restrain her.
>
> * * *
>
> The key to First Amendment analysis of government employment decision, then, is this: the government's efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when its acts as employer. The government cannot restrict the speech of the public at large just in the name of efficiency. But where the government is employing someone for the very purpose of effectively achieving its goals, such restrictions may well be appropriate.

114 S. Ct. at 1887-88. The Supreme Court then continued to

hold that a government employer comports with the First Amendment if, in attaching consequences to its employees' public utterances, it reacts in good faith and as a reasonable employer -- public or private -- would in similar circumstances, including the pains it takes to determine exactly what was said, how it was said, and to whom, before taking adverse action with respect to the employee. Id. at 1889.

It is therefore constitutionally incumbent upon a public employer to make reasonable efforts to determine what an employee is actually saying about it when considering whether to make an issue of it, and there is surely no way to do so more respectfully of the employee's rights than to ask her directly. And if she proposes to publish written material respecting her employer, or on the subject of her government work, it is certainly not unreasonable to require that she herself furnish it with a copy of her writing, even in advance of publication, if what is being said will possibly have repercussions harmful to the employer or its mission. [3] The employee is then afforded an opportunity to reconsider her text in the light of her employer's reaction to it, and the forewarned employer is enabled to make a timely and appropriate response if she declines to do so.

That is all the regulation at issue here requires of plaintiff. She must apprise her agency before she publishes of what she intends to say if the subject on which she has written

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[3] Assent to prepublication review by an agency of manuscripts its employees propose to publish as a condition of their government employment has long been accepted by the courts as constitutionally permissible in the abstract. See Snepp v. United States, 444 U.S. 507 (1980) (per curiam); McGehee v. Casey, 718 F.2d 1137 (D.C. Cir. 1983). Whether the condition is imposed by contract or by regulation is immaterial.

is a matter of "official concern." Implicit in the fact that the regulation contemplates a "decision" by the agency is the notion that the agency may approve or disapprove a manuscript, or at least have some comment upon it. But the regulation does not purport to authorize the agency to prohibit publication altogether, to censor it, or even to impose any discipline upon an author who publishes over its objection. the regulation as written is constitutional on its face, and no occasion is presented by this case to consider whether it can be abused to the point of unconstitutionality in particular circumstances.

For the foregoing reasons, it is, this 18th day of November, 1994,

ORDERED, that plaintiff's motion for summary judgment is denied; defendants' motion for summary judgment is granted, and the complaint is dismissed with prejudice.

Thomas Penfield Jackson
U.S. District Judge

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 94-5406 September Term, 1996
No. 88cv01790

Carolyn Weaver,
Appellant

v.

Joseph Duffey, USIA, Director, et al.,
Appellees

BEFORE: WALD, SILBERMAN and WILLIAMS, Circuit Judges.

ORDER

Upon consideration of appellant's petition for rehearing filed August 16, 1996, and of the response thereto, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:
Robert A. Bonner
Deputy Clerk

Circuit Judge Wald would grant the petition.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 94-5406 September Term, 1996

(No. 88cv1790)

Carolyn Weaver,
Appellant

v.

Joseph Duffey, USIA, Director, et al.,
Appellees

BEFORE: Edwards, Chief Judge; Wald, Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers and Tatel, Circuit Judges

ORDER

Appellant's Suggestion For Rehearing In Banc and the response thereto have been circulated to the full court. The taking of a vote was requested. Thereafter, a majority of the judges of the court in regular active service did not vote in favor of the suggestion. Upon consideration of the foregoing, it is

ORDERED that the suggestion be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:

Robert A. Bonner
Deputy Clerk

Circuit Judges Wald, Rogers and Tatel would grant the suggestion.

A statement of Circuit Judge Wald, joined by Circuit Judges Rogers and Tatel, is attached.

Statement of Wald, *Circuit Judge*, dissenting from the denial of rehearing *in banc*, joined by Rogers and Tatel, *Circuit Judges*.

For the reasons elaborated at length in my dissent to the panel opinion, I would grant the petition for rehearing *in banc*. The broad coverage of nonsensitive employees and the substantively oriented scope of the "clearance" process required here for all employee writings belies any notion that this clearance was designed for informative rather than deterrent purposes. The agency's and the panel's belted attempts after twenty years to transform the requirement into something it is not, *i.e.*, an "advisory" opinion only, are not credible; on its face this clearance requirement can only result in chilling employees in exercising their legitimate First Amendment rights.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 94-5406 September Term, 1995

Carolyn Weaver,

Appellant

v.

Joseph Duffey, Director,
United States Information Agency,

Appellees

Appeal from the United States District Court
for the District of Columbia
(No. 88cv1790)

Before: WALD, SILBERMAN and WILLIAMS, *Circuit Judges*.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Colombia and was argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED**, by the Court, that the judgment of the District Court appealed from in this cause is hereby affirmed, in accordance with the opinion for the Court filed herein this date.

FOR THE COURT:
Mark J. Langer, Clerk

BY:

Robert A. Bonner
Deputy Clerk

Date: July 9, 1996

Opinion for the Court filed by Circuit Judge Williams.
Dissenting opinion filed by Circuit Judge Wald.

Supreme Court, U.S.
FILED
FEB 28 1997
CLERK

(2)

NO. 96-1203

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

CAROLYN WEAVER,
PETITIONER,

V.

UNITED STATES INFORMATION AGENCY, ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

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INTEREST OF *AMICUS CURIAE*

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of working reporters and editors, dedicated to defending the First Amendment and freedom of information interests of the news media and the public. The Reporters Committee has provided representation, legal guidance and research in virtually every major press freedoms case that has been litigated in the United States since 1970.

This brief is submitted on written consent of the parties.

STATEMENT OF THE CASE

The Reporters Committee adopts the Petitioner's Statement of the Case.

SUMMARY OF THE ARGUMENT

The prepublication review policy ("review policy") at issue here, which applies to all employees of the United States Information Agency ("USIA"), including Voice of America ("VOA"), requires federal employees to submit their non-official speaking, writing and teaching materials for approval by the agency prior to publication. VOA reviews its employees' work for text that is "inaccurate," "confidential," or "inconsistent" with either the agency's operation or with United States foreign policy. One of the government's stated justifications for the review policy is the preservation of VOA's reputation as an objective news source.

Although the government may impose restraints on the job-related speech of public employees that would plainly be unconstitutional in other contexts, such restraints are invalid

when the interests of present and future employees and potential audiences, in disclosing and receiving a broad range of expression upon matters of public concern, outweigh the interest of the government, as an employer, in promoting the efficiency of the services it performs through its employees.

In the instant case, the circuit court erred in finding that the government's speculation of harm justifies the review policy. Specifically with respect to the government's interest in preserving VOA's reputation as a reliable source of objective news, that interest is not served by suppressing employee criticism. In fact, the American public and the international listening community are more likely to perceive VOA as an unbiased news provider if allegations such as Weaver's are publicly aired, institutionally addressed and responded to.

The review policy is contrary to the legislative history of USIA's enabling statute, which provides for public scrutiny of the agency and the content of its newscasts. Because VOA's broadcasts are not disseminated in this country, disclosures such as Weaver's are crucial to keeping the public informed about the agency.

Employees like Weaver can offer the public unique insights into the functioning of government agencies. In enacting whistleblower protection statutes, Congress has recognized the value of such disclosures and the need to protect outspoken workers.

Journalists who are government employees are uniquely positioned to comment about government operations. Because they are trained observers and interpreters of often complex information, journalists are arguably among the most informed and articulate voices of the citizenry. Courts have recognized the historical contributions to the marketplace of ideas by writers who are also government employees.

Our national commitment to free speech extends to government-controlled newspapers such as *Stars and Stripes*, a Department of Defense ("DoD") publication where allegations of censorship in the late 1980's resulted in an overhaul of the newspaper's practices to counter improper news management by military officials. Like VOA, *Stars and Stripes* operates under a mandate to report news in a balanced and objective way. It is ironic that VOA, an agency devoted to the dissemination of accurate news and information around the world, would adopt a review policy that is antithetical to this country's allegiance to a free press and an open exchange of ideas, particularly about governmental operations.

ARGUMENT

I. The First Amendment rights of Weaver, present and future VOA employees and their potential audiences outweigh the government's interest in organizational efficiency.

Although the government may regulate the speech of its employees more stringently than that of the general public, *Pickering v. Board of Education*, 391 U.S. 563 (1968), individuals do not forfeit the free speech rights they enjoy as citizens upon accepting public employment. *Keyishian v. Board of Regents*, 385 U.S. 589, 605-06 (1967); *Goodman v. City of Kansas City, Mo.*, 906 F. Supp. 537, 539, 542-44 (W.D. Mo. 1995) (individuals do not automatically relinquish their First Amendment rights by accepting government employment). The duty of the courts is to balance "the full protection of speech upon issues of public concern" and the "practical realities involved in the administration of a government office." *Connick v. Myers*, 461 U.S. 138, 154 (1983). In evaluating the validity of a *post hoc* restraint on public employee speech, this Court has weighed the interests of the employee, as a citizen, in commenting upon matters of public concern and the interest of the government, as an employer, in promoting the efficiency of the public services it performs through its employees. *Pickering*, 391 U.S. at 568.

In *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995) ("*NTEU*"), this Court modified the *Pickering* test to evaluate the constitutionality under the First Amendment of government restrictions on prospective employee speech. *NTEU* involved a challenge to a statutory provision prohibiting all employees from receiving honoraria for their unofficial and nonpolitical writing and speaking activities. The government contended that the ban was necessary to ensure that federal officers did not misuse or appear to misuse their power by accepting compensation, and to optimize efficiency. In

negating the honoraria ban, this Court articulated the following test:

> The government must show that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's "necessary impact on the actual operation" of the Government.

Id., 513 U.S. at 461 (imposing a higher standard of review because the statute was a "wholesale deterrent to a broad category of expression by a massive number of potential speakers"). This Court found no evidence of misconduct related to honoraria in the rank and file of low-grade federal employees, and recognized the inherent value of free and open dialogue between the employees and the public.

Thereafter, the D.C. Circuit applied the *NTEU* test to strike down an honoraria ban relating to the off-duty speech of Environmental Protection Agency employees on subjects directly related to their employment. *Sanjour v. EPA*, 56 F.3d 85 (D.C. Cir. 1995) (*en banc*). The court held that any appearance of impropriety would be the same regardless of the agency's approval or disapproval of the speech. *Id.* at 104.

The record in the instant case fails to reflect that employee criticism of the agency "necessar[ily] impact[s]" on its actual operation. As noted by the circuit court dissent:

> [T]he government has offered us no more than a few vague statements about speculative damage to the foreign relations of the United States to justify a formidable restriction on its employees' speech. With the possible exception of review for the inadvertent disclosure of classified information, the VOA has failed to meet its

> burden of showing harms that "are real, not merely conjectural," because the alleged harms do not implicate the interests of the VOA as an employer in carrying out its operational mission.

Weaver v. USIA, 87 F.3d 1429, 1444 (D.C. Cir. 1996) ("the mere invocation of 'foreign relations' has no talismanic significance in First Amendment jurisprudence"), *petition for cert. filed*, 65 U.S.L.W. 3539 (U.S. January 29, 1997) (96-1203).

A. The government has no legitimate interest in censoring unclassified material.

Even in speech restriction cases involving employees with access to national security or other sensitive information, courts have expressly stated that the government has no legitimate interest in censoring unclassified material. In *United States v. Marchetti*, 466 F.2d 1309 (4th Cir.), *cert. denied*, 409 U.S. 1063 (1972), the CIA sought to enjoin a former employee who had signed a confidentiality agreement promising that after his departure from the agency he would not divulge classified information to which he had access while a CIA employee. The employee contended such a restraint violated his First Amendment rights. While upholding the agreement, the Court distinguished between the rights at stake:

> Thus Marchetti retains the right *to speak and write about the CIA and its operations*, and *to criticize it* as any other citizen may, but he may not disclose classified information obtained by him during the course of his employment which is not already in the public domain.

Id., 466 F.2d at 1317 (emphasis added).

Under this standard, even if Weaver had access to

classified information, she would have a First Amendment right to publish an article containing nonclassified information that was critical of the agency.

B. The review policy does not address the government's stated interest in preserving VOA's reputation as an objective news source.

When the government seeks to sustain a restriction on speech, it must demonstrate that the harms it recites are real and that the restriction will in fact alleviate them to a material degree. *Edenfield v. Fane*, 507 U.S. 761 (1993). VOA requires prior review of its employees' work for text that is "inaccurate," "confidential," or "inconsistent" with either the agency's operation or with United States foreign policy. 3 Foreign Affairs Manual ("FAM") § 628.2(c). An internal memorandum dated November 24, 1986 provides the following justification for the review policy:

> [V]OA employees have a special obligation to avoid conflicts and apparent conflicts of interest which might adversely affect VOA's ability to fulfill its mission in accordance with its charter. Employees must be particularly mindful of such conflicts when engaging in outside activities such as outside employment, writing or participation in a leadership role in private organizations dealing with international relations which might call into question VOA's reliability as a source of objective news.

VOA Directive 1731A at 3c (employees must limit participation in activities that would impair VOA's "ability to function as a reliable source of news and information").

The review policy does not advance the government's interest in promoting the agency's reputation as an objective

news source. Censoring criticism by VOA employees does not enhance the agency's reputation for objectivity. In fact, the knowledge that allegations of politicization within the agency will be revealed and addressed can only enhance the confidence of both the American public and the international listening audience that the agency is adhering to its charter.

II. Employee disclosure is a crucial component of statutorily-mandated public scrutiny of VOA.

Congress expressly provided for public oversight of VOA. Section 501 of the United States Information and Educational Exchange Act of 1948, as amended, provides, in pertinent part:

> The director [of USIA] is authorized . . . to provide for the preparation, dissemination and dissemination abroad, of information about the United States, its people, and its policies, through press, publication, radio, motion pictures, and other information media, and through information centers and instructors abroad. Any such information . . . shall not be disseminated within the United States, its territories, or possessions, but, on request, shall be available in the English language at the agency, at all reasonable times following its release as information abroad, for examination only by representatives of the United States press associations, newspapers, magazines, radio systems, and stations, and by research scholars, and, on request, shall be made available for examination only to members of Congress.

22 U.S.C. § 1461 (1992).

Congress limited USIA's activities to the "foreign

sphere" in order to prevent the agency from propagandizing the American public. *Gartner v. USIA*, 726 F. Supp. 1183, 1186 (S.D. Iowa 1989). However, Congress clearly intended to provide for independent domestic oversight of USIA activities. As part of achieving that goal, the statute provides that the press, among others, may have access to USIA information. According to a Senate report, transcripts of the agency's broadcasts should be available for inspection "in order to assure that the output of USIA would be subject at all times to scrutiny by responsible people outside the agency." S.Rep. No. 647, 89th Cong., 1st Sess. 2 (1965).

The review policy is contrary to the spirit of § 501, which reflects Congress' intent that VOA operate openly, under public scrutiny. Because VOA's broadcasts are not available in this country, citizens cannot monitor the broadcasts themselves. Although the statute provides for review of USIA material by journalists, scholars and legislators, revelations by agency employees can play an essential role in keeping the public informed about VOA policies and the contents of its newscasts.

III. Public employees have much to contribute to the discussion about the efficient operation of government.

Government employees are often in the best position to comment on the strengths and weaknesses of the agencies for which they work. *Board of County Commissioners, Wabaunsee County, Kansas v. Umbehr*, 116 S.Ct. 2342 (1996); *Waters v. Churchill*, 511 U.S. 661 (1994). Staff members such as Weaver are uniquely positioned to offer insights into the workings of the agency generally, and their areas of specialization in particular. *Sanjour v. EPA*, 56 F.3d 85, 94 (D.C. Cir. 1995) (*en banc*); *Harman v. City of New York*, 945 F. Supp. 750 (S.D.N.Y. 1996); *Developments in the Law - Public Employment*, 97 Harv.L.Rev. 1611, 1768 (1984) ("public employees, by virtue of their expertise and experience, are often among the citizens

who are best informed . . . and [] their opinions are thus especially valuable to the public").

Public employees addressing "current government policies [is] perhaps the paradigmatic 'matter[] of public concern.'" *Sanjour*, 56 F.3d at 94. Therefore, public debate may be significantly enhanced by their informed opinions. *Pickering*, 391 U.S. at 572.

In *Pickering*, a teacher was terminated for writing a letter to the editor that was critical of the school budget. The Supreme Court emphasized that "[t]eachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal." *Id.* at 572. In *Goodman*, the court noted that school district personnel may be in a unique position to provide the public with information and informed opinions on matters affecting educational quality with respect to school board elections. 906 F. Supp. at 542.

Analogously, employees like Weaver have much to contribute to the public debate about VOA. Weaver's article, "*When the Voice of America ignores its charter - An insider reports on a pattern of abuses*," Columbia Journalism Review, November/December 1988 issue at 18, raised allegations of undue politicization within the agency. Only an employee with access to the inner workings of the agency could have written such an article.

Outside of the public employee context, this court has recognized that speech critical of the exercise of the State's power lies at the very center of the First Amendment. *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1034 (1991) (describing as "classic political speech" entitled to First Amendment protection an attorney's statements criticizing the indictment of

his client by the State); *Butterworth v. Smith*, 494 U.S. 624, 632 (1990) (information relating to alleged governmental misconduct is speech which has traditionally been recognized as lying at the core of the First Amendment).

A. The enactment of whistleblower protection laws demonstrates a national commitment to protecting the rights of government employees to speak out about abuses.

Congress has provided additional protections to government employees who speak out about abuses within their agencies by enacting whistleblower protection statutes. The legislative history of the Whistleblower Protection Act of 1989 recognizes that "[f]ederal employees who make disclosures ... serve the public interest by assisting in the elimination of fraud, waste, abuse and unnecessary public expenditures" and that "protecting employees who disclose Government illegality, waste, and corruption is a major step toward a more effective civil service." Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16 (1989) (codified at 5 U.S.C. § 1201 note, 1205, 1211-22 (1994)).

The fact that Congress enacted the Whistleblower Protection Act demonstrates its commitment to free and open discussion about the efficient and orderly operation of government and to protecting outspoken workers from retaliation for making such disclosures. *Arnett v. Kennedy*, 416 U.S. 134, 228 (1974) (Marshall, J., dissenting) (describing "[the] importance of Government employees' being assured of their right to freely comment on the conduct of Government, to inform the public of abuses of power and of the misconduct of their superiors . . ."); *Eberhardt v. O'Malley*, 17 F.3d 1023, 1027 (7th Cir. 1994) (noting that courts "have had to separate the not very socially valuable forms of speech from whistleblowing and other socially valuable expressive activities of public employees"); Bruce D. Fong, *Whistleblower Protection*

and the Office of Special Counsel: The Development of Reprisal Law in the 1980s, 40 Am. U. L. Rev. 1015 (1991).

In light of Congress' decree that the speech of whistleblowers is valuable and merits protection, it is irrational to let stand prepublication review policies such as the one at issue, where there is no clear threat to the orderly operation of government. The better policy is to encourage open discussion about government by those in the best position to analyze it. *Waters*, 511 U.S. at 698 ("[o]ne could make a respectable argument that high officials should allow more public dissent by their subordinates"); *accord Connick* at 168-169 (Brennan, J., dissenting) ("extreme deference to the employer's judgment is not appropriate when public employees voice critical views concerning th operations of the agency for which they work. Although an employer's determination that an employee's statements have undermined essential working relationships must be carefully weighed in the *Pickering* balance, we must bear in mind that 'the threat of dismissal from public employment is . . . a potent means of inhibiting speech.'") (citation omitted).

B. Government employees who are writers and journalists are uniquely positioned to make significant contributions to the public debate about the functioning of government.

Journalists who are government employees are uniquely positioned to comment about government operations. Because they are trained observers and interpreters of complex information, journalists are arguably among the most informed and articulate voices of the citizenry. Jason P. Isralowitz, *The Reporter as Citizen: Newspaper Ethics and Constitutional Values*, 141 U. Pa. L. Rev. 221 (1991). This Court recognized that federal employees who wrote for publications in their spare time have made significant contributions to the marketplace of ideas, including "literary giants like Nathaniel Hawthorne and

Herman Melville, who were employed by the Customs Service; Walt Whitman, who worked for the Departments of Justice and Interior; and Bret Harte, an employee of the mint." *NTEU*, 115 S.Ct. at 978 ("Respondents have yet to make comparable contributions to American culture, but they share with these great artists important characteristics that are relevant to the issue we confront").

In *Eberhardt*, the court noted a "long tradition" of valuable sociological and muckraking publications that were written by employees or other insiders of the institutions exposed, including Henry Adams's novel *Democracy*, the academic novels of Mary McCarthy, Bernard Malamud, and C.P. Snow, Jay McInerney's fictional expose of the *New Yorker* magazine, where he had been employed, and novels by Louis Auchincloss, Scott Turow, and others about law firms, law schools and prosecutors' offices. *Id.*, 17 F.3d at 1026 (finding that a state attorney's First Amendment rights were violated when he was terminated for writing a novel involving fictitious prosecutors and other persons in the criminal justice system); *see also Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1233 (7th Cir. 1993) (rejecting a privacy and libel challenge and noting the value of a historical book about the migration of African-Americans to the North).

IV. Government journalists are protected by the First Amendment and may not be censored.

In 1988, then-President Reagan signed a bill authorizing the General Accounting Office ("GAO") to investigate allegations of censorship by military commanders of *Stars and Stripes*, a Department of Defense ("DoD") newspaper that serves U.S. military personnel stationed in Europe and the Pacific that is staffed by both civilian and military journalists. *Congress Plans Inquiry on the Military Press*, N.Y. Times, Dec. 13, 1987, at A32. Five members of The Society of Professional Journalists were appointed to serve as an advisory panel to the

GAO.

Although *Stars and Stripes* is a government newspaper, its charter requires it to provide "a free flow of news and information, to operate "without censorship or news management," and to be "factual and objective[]." 22 CFR § 247.4 *et seq*. In addition to providing news like any newspaper protected by the First Amendment, *Stars and Stripes* is also charged with providing "company news" to military personnel:

> The newspaper improves morale by quelling rumours, and keeping members informed on DoD information that will affect their futures. It provides information and assistance to family members, which improve their spirits and thereby the effectiveness of their military service and/or civilian member. The newspaper encourages participation in various positive leisure-time activities to improve morale and deter alcohol abuse and other pursuits that impair their ability to perform.

22 CFR § 247.6(b)(1)(i)(C).

The GAO study found evidence of censorship at *Stars and Stripes*. For example, the report noted that the newspaper "ran a lower proportion of stories" that presented a negative image of DoD, and that addressed "politically sensitive topics" such as the Strategic Defense Initiative and the Iran-Contra Affair, than the wire services carried. The report concluded that the newspaper's dual missions -- to provide objective news and to serve as a company newspaper designed to bolster morale -- caused an inherent conflict. *See GAO Report to the Congress, Stars and Stripes, Inherent Conflicts Lead to Allegations of Military Censorship*, December 1988, GAO/NSIAD-89-60, at 5.

The report offered recommendations to address the

censorship problem, such as appointing a civilian editor who would serve for a fixed term, implementing an editorial policy emphasizing that subjects of interest to the readership be published, directing military officers to refrain from interfering or influencing news content, encouraging investigative reporting, and conducting content analyses on a periodic basis. A recent article in the *Wall Street Journal* indicates that the newspaper adopted these recommendations. Bruce G. Knecht, *The Pen is Mightier: U.S. Troops in Bosnia Swear By a Newspaper that Generals Swear at*, Wall Street J., Dec. 23, 1996, at A1 ("After years of sometimes serving as little more than a Pentagon house-organ, *Stars and Stripes* now produces hard-hitting reports on the very military complex that publishes and subsidizes it").

The case of *Stars and Stripes* is instructive because there, censorship was found to be unacceptable, even in the context of a government controlled newspaper designed in part to boost troop morale. The allegations of censorship led to an investigation and recommendations designed to eradicate censorship and improper news management. As with *Stars and Stripes*, the VOA is required to adhere to the same basic journalistic principles, methods, values and standards as other news organizations, as reflected in its charter:

> The long-range interests of the United States are served by communicating directly with the people of the world by radio. To be effective, the Voice of America . . . must win the attention and respect of listeners. These principles will therefore govern Voice of America (VOA) broadcasts: (1) VOA will serve as a consistently reliable and authoritative source of news. VOA news will be accurate, objective, and comprehensive. (2) VOA will represent America, not any single segment of American society, and will therefore present a balanced and comprehensive projection of significant

> American thought and institutions. (3) VOA will present the policies of the United States clearly and effectively and will also present responsible discussion and opinion on these policies.

VOA Charter, signed into law by President Gerald R. Ford, July 12, 1976; 22 U.S.C. § 1463; 22 CFR § 504.2(e)(1)(i)(A)-(C).

It is ironic that VOA, a source of news to citizens of countries with no free press and/or repressive regimes, where censorship and government distortion is rife, would promulgate a review policy that has the effect of hampering robust debate by those well-situated to raise concerns about its operation. The review policy is antithetical to this country's strong commitment to a free press and an open exchange of ideas.

CONCLUSION

The review policy at issue here is unacceptable because it censors potential speech based upon vague government assertions of harm. *NTEU*, 115 S. Ct. at 1017 n.21 (deferring to the Government's speculation about the pernicious effects of thousands of articles and speeches yet to be written or delivered would encroach unacceptably on the First Amendment's protections).

Moreover, the review policy is contrary to VOA's mission to broadcast unbiased information to countries lacking a free press.

> Since its establishment . . . [VOA] has aimed at what it calls the 'denied' areas of the world where governments restrict the free flow of information. From China and Cambodia to Eastern Europe, people secretly tuned in on the

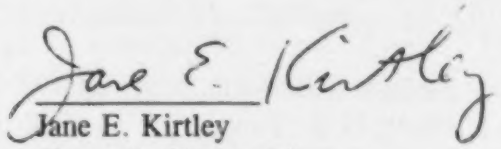
> often heavily jammed [VOA] . . . According to Richard Carlson, director of [VOA], "Our most important job is supplying what maestro Rostropovich once described as 'daily bread for people,' and that is what we are doing, intellectually feeding hungry people."

Barbara Gamarekin, *Voice of America Has Some Wondrous Plans*, N.Y. Times, Oct. 7, 1988, at A18. The review policy is similarly contrary to the agency's mandate to adhere to accepted journalistic practices.

According to Director Carlson, "[n]either the State Department nor U.S.I.A. nor the V.O.A. director has the right to interfere in the news report." *Id.* Similarly, the agency should not interfere with the nonclassified speech of its own employees. VOA exists to provide open debate and a free press to people in parts of the world where such freedoms are unknown. VOA should not engage in censorship.

For the foregoing reasons, we ask this Court to grant the petition for a writ of *certiorari*.

Respectfully submitted,



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No. 96-1203

In the Supreme Court of the United States

OCTOBER TERM, 1996

CAROLYN WEAVER, PETITIONER

v.

UNITED STATES INFORMATION AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

Employees of the State Department, the United States Information Agency, and the Agency for International Development are required under a provision of the Foreign Affairs Manual (FAM) to allow their employing agency to review proposed speaking, writing, and teaching materials on matters of "official concern"—i.e., materials which "may reasonably be interpreted as relating to the current responsibilities, programs, or operations of any employee's agency, or to current [United States] foreign policies, or which reasonably may be expected to affect the foreign relations of the United States." 3 FAM Subch. 4100, App. A, § 628.2(a). The question presented in this case is whether Section 628.2 is consistent with the First Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-60a) is reported at 87 F.3d 1429. The opinion of the district court (Pet. App. 61a-65a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 9, 1996. A petition for rehearing was denied on October 31, 1996. The petition for a writ of certiorari was filed on January 29, 1997. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Employees of the State Department, the United States Information Agency (USIA), and the Agency for International Development (AID) are required to submit all speaking, writing and teaching material on matters of "official concern" to their employing agency for review prior to publication. 3 United States Department of State Foreign Affairs Manual (FAM) Subch. 4100, App. A, § 628.2 (Nov. 8, 1995). Section 628.2 provides in relevant part:

> a. * * * All speaking, writing, and teaching materials which may reasonably be interpreted as relating to the current responsibilities, programs, or operations of any employee's agency or to current U.S. foreign policies, or which reasonably may be expected to affect the foreign relations of the United States are of official concern and shall be submitted * * * for clearance by the employee's agency, whether the employee is acting officially or privately.
>
> b. No employee shall publish any material of official concern under paragraph a until it has been cleared. The purpose of this clearance requirement is to substitute the agency's institutional judgment for the employee's judgment when the question involved concerns either the release or accuracy of information concerning the employee's agency's responsibilities or what conclusions should be drawn from such information * * *
>
> c. Clearance will not be granted until all classified material and all material of official

> concern under paragraph a which is inaccurate, inconsistent with current foreign policy, or can reasonably be expected to affect adversely U.S. foreign relations, has been deleted from the proposed speaking, writing, or teaching material.

When the employee proposes to publish in his or her private capacity, the FAM also makes the "employee responsible for having published with [the material] a specific statement to the effect that the opinions and views expressed are the employee's own and not necessarily those of the employee's agency." 3 FAM § 628.5-3.

2. Petitioner Carolyn Weaver, a part-time writer for the Voice of America (VOA), a unit of USIA, published an article in a journal in 1988 without submitting the article to her employer for prepublication review under FAM Section 628.2. The article was entitled, "When the Voice Of America ignores its charter—An insider reports on a pattern of abuses." The article discussed a number of issues concededly of official concern, including a criticism of VOA's alleged broadcasting of coded signals to Solidarity activists by playing a song from a Rod Stewart album. An agency official read petitioner an oral admonishment for her failure to comply with the prepublication review requirement. Pet. App. 2a-3a.

Before receiving the oral admonishment, petitioner filed suit in district court to challenge the review procedure contained in Section 628.2 as unconstitutional under the First Amendment. Petitioner later amended her complaint to contest the admonishment. Pet. App. 3a.

The district court granted USIA's motion for summary judgment. Pet. App. 61a-65a. Applying the balancing test developed in *Pickering* v. *Board of Educ.*, 391 U.S. 563 (1968), for assessing the validity of restrictions on public employees' speech, the court concluded that "[t]he regulation as written is constitutional on its face." Pet. App. 65a. The court reasoned that "the regulation does not purport to authorize the agency to prohibit publication altogether, to censor it, or even to impose any discipline upon an author who publishes over its objection." *Ibid.* The court also found that if an employee "proposes to publish written material respecting her employer, or on the subject of her government work, it is certainly not unreasonable to require that she herself furnish it with a copy of her writing, even in advance of publication, if what is being said will possibly have repercussions harmful to the employer or its mission." *Id.* at 64a.

3. A divided panel of the court of appeals affirmed, holding that Section 628.2's prepublication review requirement comports with the First Amendment. Pet. App. 1a-60a.[1] The court of appeals observed that Section 628.2 was "not entirely clear" (*id.* at 11a) whether the rule "authorize[d] punishment for publication of material disapproved under the criteria" of Section 628.2(c). *Id.* at 12a. The court observed that, if it did, "the regulation would raise serious constitutional issues," because "it is doubtful that the agency

[1] Because the court of appeals concluded that petitioner had failed to exhaust her administrative remedies under the Civil Service Reform Act of 1978, the court of appeals also upheld the district court's dismissal of the counts of the complaint that related specifically to petitioner's oral admonishment. Pet. App. 4a-10a. That issue is not before this Court.

could, consistent with [*Pickering*], penalize publications devoid of non-public information, by employees with non-sensitive responsibilities * * * simply because the publication took a view 'inconsistent with current foreign policy.'" *Id.* at 12a-13a (quoting 3 FAM 628.2(c)).

The government argued, however, that Section 628.2 should not be interpreted to "authorize any form of punishment for publication of material disapproved by the agency, so long as it was submitted for review beforehand." Pet. App. 12a. The court adopted the "procedural interpretation" advanced by the government. *Id.* at 16a. The court explained that its interpretation was guided by "the constitutional difficulties entailed by reading § 628.2 more broadly than suggested by the government," and its reluctance "to find burdens on speech that the government eschews any intention to impose." *Id.* at 19a.

The court of appeals then applied a balancing test that weighed "the government interest in 'promoting the efficiency of the public services it performs through its employees'" against "the interest of prospective speakers and their audiences in free dissemination of the speakers' views." Pet. App. 20a (quoting *United States* v. *National Treasury Employees Union (NTEU)*, 513 U.S. 454, 465-468 (1995)). Applying that test, the court found that Section 628.2 "clearly passes muster." Pet App. 23a.

The court emphasized that "[n]o speech is forbidden" under Section 628.2. Pet. App. 23a. The court also rejected petitioner's argument that "the government, though lacking the authority to prohibit publication of unapproved material, may informally pressure employees to make the desired changes." *Ibid.* The court reasoned that "if publication without

the change could be punished after the fact under *Pickering*, then presumably the employee is not made worse off by having advance notice of the government's view." *Id.* at 23a-24a. "If, on the other hand, publication of the unaltered material cannot constitutionally be punished," the court continued, "then the employee has nothing to fear by going ahead." *Id.* at 24a.

The court also concluded that Section 628.2's review "process permits the government to take corrective action before the unauthorized disclosure of classified information occurs." Pet. App. 25a. Even though Section 628.2 applies to personnel who do not have direct access to classified information, the court pointed to the government's evidence that "even employees without such direct access may inadvertently, and even unknowingly, come into contact with classified information." *Ibid.* In addition, the court found that if an employee intends to publish statements that could damage the foreign relations of the United States, prepublication review "enables the government to contact foreign powers and assuage their concerns about U.S. policy." *Id.* at 26a.

The court further concluded that the "advance nature of the review is at a minimum 'reasonably necessary' to protect the government's interests." Pet. App. 26a (quoting *NTEU*, 513 U.S. at 574)). The court reasoned that, "[a]s to classified information, advance review is plainly essential to preventing dissemination of the information." *Id.* at 26a-27a. And, the court explained that "as to other sensitive material, only review before publication enables the government to take preemptive rather than merely reactive steps in response." *Id.* at 27a.

Finally, the court assessed the burdens on employee speech. "As to the duration of the review process," the court observed, petitioner "makes no claim of long delays." Pet. App. 27a. Nor did the court "think those who have secured formal roles explicating and advancing U.S. Foreign policy—or even those who have found employment in an agency charged with that role—have a transcendent interest in instant publication of statements made on agency-related matters." *Ibid.*

Judge Wald dissented. Pet. App. 29a-60a. In her view, the only reasonable construction of Section 628.2 "is that if the employee publishes material of 'official concern' without prior agency approval she has violated agency regulations and can expect to be punished." *Id.* at 34a. Judge Wald also expressed the view that even under the majority's interpretation of Section 628.2, the regulation fails the balancing test employed by the majority, because the agency "has not convincingly demonstrated that it needs to conduct such review in the case of all its employees," Pet. App. 48a, and the regulation "chills potential speech before it happens." *Id.* at 55a (emphasis omitted) (quoting *NTEU*, 513 U.S. at 468)).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review therefore is not warranted.

1. Petitioner argues (Pet. 16-18) that the Court should grant review to consider the proper interpretation of Section 628.2. We have been informed, however, that the Department of State, USIA, and AID have begun the process of redrafting the rules set

forth in Section 628.2, and that the contemplated revisions will address the ambiguities identified by the court of appeals.[2] Especially in these circumstances, the correctness of the court of appeals' interpretation of Section 628.2 does not present an issue of substantial importance for the Court to consider. As currently envisioned, the new rules would establish a rebuttable presumption that speeches and writings on matters of official concern by employees are delivered or published in the employee's private capacity when accompanied by a disclaimer that the views expressed are the employee's own view.[3] For speech understood to be delivered or published in a private capacity, the rules would require prepublication review only for the purpose of deleting information protected from disclosure by statute, such as classified information and information protected under the Privacy Act, 5 U.S.C. 552a, and the Freedom of Information Act, 5 U.S.C. 552. Thus, because the new rules would make clear that they do not operate to ban or punish speech

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[2] Because Section 628.2 governs agency personnel, both the agencies may amend the rule without notice and comment rulemaking procedures. See 5 U.S.C. 553(a)(2). The agencies expect to issue the new rules by August, 1997.

[3] Under the approach now under consideration, for senior employees of a specified rank, the presumption could be overcome only by a designated senior official's written determination establishing that, notwithstanding the disclaimer, the employee's views would be likely to be attributed to the agency and demonstrably to impair the foreign affairs mission of the agency. For lower ranking employees, the presumption could be overcome only by a written determination to the same effect by the head of the agency or other agency principal. Where the presumption is overcome, an employee's speech would be considered to be speech delivered in the employee's official capacity, and would be regulated as such.

(other than that revealing information protected by statute) if it is clearly understood to be delivered in an employee's private capacity, the interpretation of Section 628.2 is not an issue warranting this Court's review.

In any event, petitioner's arguments regarding the interpretation of Section 628.2 lack merit. Contrary to petitioner's suggestion (Pet. 16-18), Section 628.2 does not prohibit employee speech. Narrowly construed, Section 628.2 allows the government to examine writings by an employee relating to matters of official concern prior to publication, and to make suggestions concerning the proposed writings that the employee is free to accept or reject. The court of appeals correctly declined to interpret Section 628.2 in a manner that has not been advanced by the agency administering the rule, and that would "raise serious constitutional issues" if it were adopted. Pet. App. 12a; see also *id.* at 13a (citing *United States* v. *Jin Fuey Moy*, 241 U.S. 394, 401 (1916), and *Rust* v. *Sullivan*, 500 U.S. 173, 191 (1991)).

As the court of appeals observed, VOA's practice comports with the court of appeals' interpretation of Section 628.2. According to an affidavit submitted by the acting director of the VOA office that administers Section 628.2 for the VOA, "there was at that time no instance in the institutional memory of the office (stretching back about five years) in which a VOA employee had refused to make changes requested by the agency." Pet. App. 18a. Indeed, the application of Section 628.2 to petitioner in this case is consistent with the court of appeals' procedural interpretation of the rule. A written copy of petitioner's admonishment "chastises her only for having published her article 'without proper clearance *procedures*'" and

"makes no mention of substantive violations." *Ibid.* (emphasis added by the court).

2. No other court of appeals has addressed the validity of Section 628.2. Contrary to petitioner's assertion (Pet. 15-16), the decision below does not conflict with the Fourth Circuit's decision in *United States* v. *Marchetti*, 466 F.2d 1309, cert. denied, 409 U.S. 1063 (1972). The Fourth Circuit in *Marchetti* upheld the constitutionality of a secrecy agreement that required employees, prior to publication, to submit material to the Central Intelligence Agency (CIA) for the agency's approval. 466 F.2d at 1317-1318. In so holding, the Fourth Circuit stated that "with respect to information which is unclassified or officially disclosed," the First Amendment "limits the extent to which the United States * * * may impose secrecy requirements upon its employees and enforce them with a system of prior censorship." *Id.* at 1313. That statement was dictum, however, and it is not in any event in conflict with the decision below, which involves only a review process, not prior censorship. As the court of appeals observed, the speech restrictions in *Marchetti* "clearly intended substantive application," and thus the courts' "dictum * * * is not pertinent" to this case. Pet. App. 25a n.4.

3. a. The court of appeals correctly concluded that Section 628.2 prepublication review requirement "passes muster." Pet. App. 23a. Regulations that impinge on speech of government employees are judged under a First Amendment test that requires a court to weigh "the interests of the [employee], as a citizen, in commenting upon matters of public concern" against "the interest of the [government], as an employer, in promoting the efficiency of the public services it performs through its employees." *Picker-*

ing, 391 U.S. at 568. Where a generally applicable rule is at issue, the "expression's 'necessary impact on the actual operation' of the Government" must outweigh the interests of both employees and potential audiences "in a broad range of present and future expression." *NTEU*, 513 U.S. at 468 (quoting *Pickering*, 391 U.S. at 571).[4]

That balancing test permits the government to "impose restraints on the job-related speech of public employees that would be plainly unconstitutional if applied to the public at large." *NTEU*, 115 S.Ct. at 1012. See *e.g.*, *Snepp* v. *United States*, 444 U.S. 507, 509 n.3 (1980) (per curiam) (upholding secrecy agreement requiring prepublication review to screen for secret information relating to national security); *Civil Service Comm'n* v. *National Ass'n of Letter Carriers*, 413 U.S. 548 (1973) (upholding Hatch Act's prohibition on partisan political activity by federal employees).

The use of such a balancing test reflects the recognition that the government, when it acts as employer, "has far broader powers than does the government as sovereign," because of "the nature of the government's mission as employer." *Waters* v. *Churchill*, 511 U.S. 661, 671, 674 (1994). "In striking that balance, * * * '[t]he government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it

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[4] Although petitioner relies (Pet. 12-14, 19-20) on decisions of this Court that did not involve expression by public employees, the dissenting opinion below did not quarrel with the majority's application of "the test of *Pickering* and *NTEU*" to determine the validity of Section 628.2. Pet. App. 23a; see *id.* at 43a (applying "[t]he *Pickering/NTEU* balancing test").

acts as employer.'" *Board Of County Comm'rs* v. *Umbehr*, 116 S.Ct. 2342, 2348 (1996) (quoting *Waters*, 511 U.S. at 675). Thus, the Court has consistently given "substantial deference * * * to the government's reasonable view of its legitimate interests." *Umbehr*, 116 S. Ct. at 2348-2349.

b. Balancing the nature of the restriction imposed by the review process under Section 628.2 and the significant governmental interest that supports that process, Section 628.2 is constitutional.

i. The court of appeals correctly determined that Section 628.2's review process imposes only limited restrictions on employees' rights of expression. The rule requires that a VOA employee, before writing on a matter reflecting the business of her agency, first allow her agency to comment about the proposed speech to the extent it is "inaccurate, inconsistent with current foreign policy, or can reasonably be expected to affect adversely U.S. foreign relations." 3 FAM § 628.2(c). The regulation does not authorize the agency to forbid publication.

Petitioner is incorrect that the prepublication review process constitutes a "wholesale deterrent to a broad category of expression by a vast number of potential speakers." Pet. 22. The prepublication review procedures apply to only that speech "which may reasonably be interpreted as relating to the current responsibilities, programs, or operations of any employee's agency or to current U.S. foreign policies, or which reasonably may be expected to affect the foreign relations of the United States." 3 FAM § 628.2(a). Compare *NTEU*, 115 S.Ct. at 1012 ("With few exceptions, the content of [public employees'] messages [subject to honorarium ban] has nothing to do with their jobs and does not even arguably have any

adverse impact on the efficiency of the offices in which they work.").

Because the rule allows the agency only to comment upon, but not to censor, employee speech, "[t]he primary burden on employees from the regulation is simply the delay associated with submitting to the review process prior to publication." Pet. App. 23a. Petitioner does not assert, however, that the review entailed under Section 628.2 is lengthy. *Ibid.* Moreover, the new rules being drafted by the Department of State and USIA to supersede Section 628.2 are expected to provide a 30-day time period in which prepublication review must be completed.

ii. The court of appeals also was correct in determining that Section 628.2 is supported by several significant interests. The process of prepublication review guards against the improper disclosure of classified information. That interest is "vital" and "compelling" (*Snepp*, 444 U.S. at 509 n.3) and is present whether the disclosure is intentional or inadvertent. *Id.* at 512 (when an employee "relies on his own judgment about what information is detrimental, he may reveal information that the [agency]—with its broader understanding of what may expose classified information and confidential sources—could have identified as harmful"). The prepublication review procedures also permits VOA to maintain its mission as an apolitical "source of news." Foreign Relations Authorization Act, Fiscal Year 1977, Pub. L. No. 94-350, § 206, 90 Stat. 832. VOA must "present the policies of the United States," 90 Stat. 832, and an employee's freelance or misdirected speech on matters related to the agency's policies or to the foreign relations of the United States could threaten VOA's basic mission to broadcast "accurate, objective and

comprehensive" news throughout the world. 90 Stat. 831. This Court has "consistently given greater deference to government predictions of harm used to justify restriction of employee speech than predictions of harm used to justify restrictions on the speech of the public at large." *Waters*, 511 U.S. at 673. That deference is particularly warranted in this case, because government officials need sufficient latitude to operate effectively in the arena of foreign affairs. See *e.g.*, *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 318-319 (1936); *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-589 (1952). Petitioner's article illustrates the danger that prepublication review is designed to prevent. Subtitled as a report by "an insider," the article could be read to represent the views of the United States. Previewing material of official concern enables the agency to respond appropriately, including "contact[ing] foreign powers and assuag[ing] their concerns." Pet. App. 26a.

Petitioner also argues (Pet. 23) that Section 628.2 is not "tailored" to the interest of preventing dissemination of classified information. As the court of appeals determined, however, advance review is appropriate because publication of classified information generally cannot be cured after the fact. Pet. App. 26a. Similarly, "as to other sensitive material," the court of appeals correctly found that "only review before publication enables the government to take preemptive rather than merely reactive steps in response." *Id.* at 26a-27a. Moreover, "because of the risk of unintended leakage of classified or other sensitive information" (*id.* at 28a), Section 628.2's application to all VOA employees is reasonable. The court of appeals observed that the review process

"may be particularly important" to employees without direct access to classified information or sensitive foreign policy information, because "unintended recipients of information are especially likely to have no idea that their material may harbor damaging disclosures." *Ibid.*[5] Given the government's interests and the absence of any "claim of long delays" (Pet. App. 27a), Section 628.2's review process restricts no more speech than is reasonably necessary to achieve the government's interests. For that reason—and because there is no circuit conflict on the question presented and the responsible agencies are in the process of revising the relevant provisions of the FAM—review by the Court is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[5] The disclaimer requirement under 3 FAM 628.5-3 obviously does not in itself prevent inadvertent disclosure of sensitive or classified information, and petitioner does not suggest otherwise. Thus, only advance review adequately safeguards against that risk.